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Health Care Sharing Ministries: Scam or Solution?

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HEALTH CARE SHARING MINISTRIES: SCAM OR SOLUTION?

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I. INTRODUCTION TO HEALTH CARE SHARING MINISTRIES

Individuals and families face difficult choices about health care as the costs of medical care and health insurance continues to rise, and as the Patient Protection and Affordable Care Act's "Individual Mandate" approaches. Well over 160,000 Americans have found a solution for the high costs of medical care and health insurance through the services of Health Care Sharing Ministries (HCSMs).[1] Members of HCSMs also have the benefit of a religious exemption from the "Individual Mandate" in the Patient Protection and Affordable Care Act (PPACA).[2] In brief, these ministries provide "a health care cost sharing arrangement among persons of similar and sincerely held beliefs."[3] HCSMs are not-for-profit religious organizations that act as clearinghouses for "those who have medical expenses and

[1] *What is a Health Care Sharing Ministry?*, THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *available at* http://www.healthcaresharing.org/hcsm (last visited May 27, 2013); *see also* Twila Brase, *MEDICAL SHARING, An Inexpensive Alternative to Health Insurance*, CITIZENS' COUNCIL ON HEALTH CARE, 1 (January 2010), http://www.cchfreedom.org/pr/MEDICAL_SHARING-FINAL_JAN2010.pdf. The number of people participating in HCSMs is higher than reported on the Alliance website. *See infra* text accompanying note 7.

[2] Patient Protection and Affordable Care Act, 26 U.S.C.A. § 5000A (West 2012).

[3] *See* THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *supra* note 1 (the Alliance represents two HCSMs, the Christian Care Ministry Medi-Share program and Samaritan Ministries International).

those who desire to share the burden of those medical expenses."[4] The Alliance of Health Care Sharing Ministries, which represents two of the three major HCSMs, provides this further information:[5]

- HCSMs receive no funding or grants from government sources.
- HCSMs are not insurance companies. HCSMs do not assume any risk or guarantee the payment of any medical bill. Twenty-one states as of August 2012 have explicitly recognized this and specifically shelter HCSMs from their insurance codes.[6]
- HCSMs serve more than 160,000 people, with participating households in all fifty states.[7]
- HCSMs' participants share more than $120 million per year for one another's health care costs.
- HCSMs strive to be accessible to participants regardless of their income.
- Traditionally, HCSM costs are a fraction of the cost of insurance rates.[8]

Health Care Sharing Ministries have operated in the United States for about thirty years.[9] HCSMs are "founded on the biblical mandate of believers to share each other's needs."[10] HCSM members "seek to apply Galatians 6:2, 'Bear one another's burdens, and thus fulfill the law of Christ' to . . . ever-rising medical costs which can be quite burdensome for anyone . . . "[11] HCSMs enshrine "a principle that has been around since the birth and growth of the early Church. The Book of Acts reports, 'All the believers were together and had everything in common. Selling their possessions and goods, they gave to anyone as he had need.'"[12] Christian members of HCSMs "are making a decision to be there for their neighbor in need and bring glory to God in the process of sharing."[13]

This Article begins with a survey of the general regulatory landscape for HCSMs. Following that, four key questions about HCSMs structure the rest of this Article. The first question asks, what are HCSMs? To answer that question, this

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[4] *See* THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *supra* note 1.

[5] *See* THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *supra* note 1.

[6] E-mail from John Creath, Pub. Pol'y Specialist, Samaritan Ministries, to Benjamin Boyd (July 20, 2012, 13:48 MT) (on file with author) (as of August 2012, 21 states have exemptions for HCSMs).

[7] E-mail from Brian Heller, Gen. Counsel, Samaritan Ministries, to Benjamin Boyd (July 26, 2012, 08:43 MT) (on file with the author) (Heller states there are now over 160,000 HCSM members.).

[8] *See* THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *supra* note 1.

[9] *See* THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *supra* note 1.

[10] *See* THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *supra* note 1.

[11] *See* THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *supra* note 1.

[12] *See* THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *supra* note 1.

[13] *See* THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, *supra* note 1.

Article examines the basic aspects of the Medi-Share program and the Christian Brotherhood Newsletter. Second, this Article asks, what law applies to HCSMs? In reply, this Article briefly surveys the key elements of insurance law and the law governing HCSMs. Third, this Article asks, how have courts treated HCSMs? To answer, this Article surveys two key state court decisions involving HCSMs. Fourth, this Article asks, how should courts treat HCSMs? To answer the last question, the Article examines U.S. Supreme Court precedent, the legal and logical problems courts and insurance regulators face by forcing HCSMs into insurance law, and lastly examines some important considerations lingering on the sidelines – the freedom of contract, the freedom of religion, the separation of powers, the implications of HCSMs' status as charitable religious organizations, and federal preemption of the regulation of HCSMs under PPACA. This Article concludes first by examining the epilogue to the *Reinhold*[14] decision in Kentucky and second by providing some general observations and analysis about HCSMs.

II. AN INTRODUCTION TO THE REGULATORY LANDSCAPE

HCSMs certainly sound commendable, but how have state and federal government officials viewed HCSMs? HCSMs do have some friends in the corridors of state power.[15] James Atterholt, Indiana Insurance Commissioner, opined that HCSMs are "a group of charitable organizations . . . are providing a much needed answer to one of the greatest problems affecting all Americans today: the payment of medical expenses."[16] Atterholt continued: "[t]he members of these organizations have voluntarily joined their respective communities to put their faith into practice by supporting one another in some of their most serious times of need, much like religious communities such as the Amish have done for centuries."[17] Further:

> [t]hese charitable organizations have already been there providing the solution, one individual at a time. HCSM members are putting their beliefs into actual, day-to-day practice, that it is their responsibility to bear burdens of the members of the community which they voluntarily joined because of their common faith and values.[18]

Atterholt concluded, "I would encourage all regulators to respect citizens' rights to freely pursue their own solutions for their medical expenses, and recognize HCSMs for what they are: charitable organizations serving individuals who voluntarily support one another in their time of need."[19]

Likewise, Ralph Hudgens, Georgia's Commissioner of Insurance, found HCSMs "a remarkable free-market approach to paying for medical bills."[20] Hudgens reported

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[14] Commonwealth v. Reinhold, 325 S.W.3d 272 (Ky. 2010).

[15] Letter from James Atterholt, Comm'r, Ind. Dep't of Ins. to James Lansberry, President, Alliance of Health Care Sharing Ministries (May 7, 2009) (on file with author).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Letter from Ralph T. Hudgens, Comm'r of Ins., State of Ga., to James Lansberry, President, Alliance of Health Care Sharing Ministries (Mar. 4, 2011) (on file with author).

Georgia has "not had any problems with Health Care Sharing."[21] Mr. Hudgens concluded, "Health Care Sharing Ministries are not insurance companies but charitable organizations helping participants pay their medical bills. I applaud your efforts to find free market solutions to improve access to health care."[22] Further, Mr. John Doak, Oklahoma Insurance Commissioner, wrote that "[m]any members of these organizations say they also receive spiritual support from their health-care sharing ministry, beyond the financial impact of the group."[23] After noting that PPACA exempts "members of a health-care sharing ministry from being required to purchase private insurance," Doak continued: "[a]s a man of great faith, an opponent of PPACA, and an advocate of free-market solutions to insurance issues, I support health-care sharing ministries as an option for Oklahoma consumers."[24]

Apparently, HCSMs also have some allies in the halls of Congress. As noted above, PPACA contains a religious exemption for HCSM members from the mandate to purchase insurance.[25] Why would these relatively small ministries receive a religious exemption from the individual mandate? HCSM representatives persuaded Senate staff members with "more than just an argument based on freedom of religion . . . ."[26] "[T]hey pointed to the Obama administration's promise that those who were happy with their current health coverage could keep it."[27] HCSM subscribers received a religious exemption from PPACA's individual mandate precisely because HCSM members are paying their bills and sharing other members' medical expenses.[28] In the words of the Act, the "medical expenses of its members have been shared . . . ."[29] The HCSM religious exemption from PPACA's individual mandate, coupled with HCSMs' remarkably low rates when compared to the costs of health insurance, have contributed to an increased interest in HCSMs.[30]

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[21] *Id.* ("As far as I know, we have had no consumer complaints.").

[22] *Id.*

[23] John D. Doak, *Understanding Faith-Based Options for Health Care*, OK.GOV (Aug. 22, 2012), http://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=157&article_id=3765.

[24] *Id.*

[25] Patient Protection and Affordable Care Act, 26 U.S.C.A. § 5000A (West 2012); *see also*, *Christians Are Exempt From Insurance Mandates*, CHRISTIAN CARE MINISTRY (Aug. 1, 2012), http://mychristiancare.org/exemption.aspx.

[26] Steve Twedt, *Health Care Overhaul Law Exempts Sharing Ministries*, PITTSBURGH POST-GAZETTE (July 3, 2012), http://www.post-gazette.com/stories/news/health/health-care-overhaul-law-exempts-sharing-ministries-269561/?p=0.

[27] *Id.*

[28] *Id*.

[29] Patient Protection and Affordable Care Act, 26 U.S.C.A. § 5000A(d)(2)(B)(ii)(IV) (West 2012).

[30] *Interest in Samaritan Ministries Increases Following SCOTUS Decision on Health Care Law*, PRWEB.COM (July 5, 2012), http://www.prweb.com/releases/samaritanministries/07/prweb9668682.htm; *see also* Christine A. Scheller, *'Obamacare' Prevails: Supreme Court Upholds Healthcare Law*, URBAN FAITH (June 28, 2012), http://www.urbanfaith.com/2012/06/obamacare-prevails-supreme-court-upholds-healthcare-law.html/.

However, HCSMs do have some foes in the corridors of state power. HCSMs have not gone without challenge, despite their evident charitable and religious emphasis. The Kansas Insurance Commissioner, while recognizing the truly "religious programs," nevertheless believed PPACA's religious exemption for HCSMs will lead to "scammers . . . creating fake ministries and soliciting members."[31] One observer called an HCSM a Ponzi scheme.[32] An appellate judge voiced concerns that an HCSM subjected subscribers to "potential scams and other unscrupulous tactics."[33] Judge Nickell of Kentucky's Court of Appeals thought Medi-Share was "at best, a supplemental plan for payment of the health care needs of its trusting subscribers, and, at worst, a poor substitute for regulated health insurance."[34] A few state insurance departments have gone farther, and brought legal challenges to these ministries, maintaining HCSMs operate as illegal insurance companies.[35]

Most recently, the State of Washington's Insurance Commissioner, Mike Kriedler, issued Samaritan Ministries its first[36] cease-and-desist order on April 1, 2011, "telling Samaritan to stop engaging in the unauthorized business of insurance

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[31] Michelle Andrews, *Some Church Groups Form Sharing Ministries To Cover Members' Medical Costs*, KAISER HEALTH NEWS (Apr. 21, 2011), http://www.kaiserhealthnews.org/features/insuring-your-health/michelle-andrews-on-health-care-religious-cooperatives.aspx.

[32] Michael deCourcey Hinds, *Christian Group Criticized As Unsound Insurance Plan*, N. Y. TIMES (June 14, 1993), http://www.nytimes.com/1993/06/14/us/christian-group-criticized-as-unsound-insurance-plan.html?pagewanted=all&src=pm ("Mr. Needham said the brotherhood program was like a Ponzi scheme, requiring a constant flow of new investors to pay off those who joined the scheme earlier.") Needham was a spokesman for Delaware's Department of Insurance. *Id.*

[33] Commonwealth v. Reinhold, 2008 WL 4530900 (Ky. Ct. App. Oct. 10, 2008) (Thompson, J., dissenting) (Judge Thompson also noted: "consumers in states such as Ohio have incurred the financial consequences of the lack of regulation of such businesses." Judge Thompson was referring to a prior incident in 2001 where Ohio's Attorney General filed suit against the Christian Brotherhood Newsletter, the oldest HCSM, charging the founder of the ministry, Bruce Hawthorn, with fraud and conversion of ministry funds and property. Ohio's "lawsuit demands return of property and cash valued at more than $2.4 million . . . "); *see generally* Chuck Fager, *Lawsuit: Health Plan Accused*, CHRISTIANITY TODAY ONLINE (Apr. 2, 2001), http://www.christianitytoday.com/ct/2001/april2/8.23.html ("The Christian Brotherhood Newsletter had to repay nearly $15 million that previous management spent on homes, motorcycles and luxury cars. The company was placed in receivership in 2001, and the management was removed."); *see* Sarah Skidmore, *Sharing the Burden: Regulation-Free Religious Groups Offer Cost-Sharing Alternatives to Traditional Health Insurance by Banning Risky, High-Cost Behavior*, SAN DIEGO UNION-TRIBUNE (Jan. 8, 2006), http://www.utsandiego.com/uniontrib/20060108/news_lz1b8burden.html (after this lawsuit, the Newsletter continued to operate under new management with established safeguards to prevent future problems).

[34] *See Reinhold*, 2008 WL 4530900 (Nickell, J., concurring in result only).

[35] *See, e.g.,* Notice of Proposed Agency Action And Opportunity for Hearing, (Administrative Fine, Permanent Cease and Desist Order and Restitution, *In re* Am. Evangelical Ass'n, Case No. 2006-1 (Mont. Auditor May 22, 2007), *available at* http://www.sao.mt.gov/legal/insurance/pdf/I07_Medishare Notice.pdf.

[36] *See* Andrews, *supra* note 31, ("[t]his month's action was the first against Samaritan Ministries . . . .").

in Washington State [sic]."[37] Commissioner Kriedler stated: "[t]hey've made a commitment to what is effectively health insurance, that when you need to have your medical bills paid they'll help or will pay those costs for you . . . ."[38] Kriedler also stated, "[o]ur insurance laws exist to protect consumers and make sure that insurers live up to their promises . . . [m]embers of groups like this don't have those protections."[39] In an effort to steer clear of insurance regulations, HCSMs have worked for statutory "safe harbors" from state insurance codes in twenty-one states.[40] Indeed, Washington's Insurance Commissioner lifted Samaritan Ministries' cease-and-desist order when the Washington Legislature and Governor Gregoire acted quickly to pass Wash. S.S.B. 5122 within 40 days of the cease and desist order.[41] Wash. S.S.B. 5122 excluded HCSMs from regulation under Washington's Insurance Code.[42]

At times, state insurance and commerce departments have brought legal actions against HCSMs, alleging the specific ministries engaged in the unauthorized sale of insurance, or the sale of insurance without a license.[43] The freedom to share health care costs through HCSMs has depended largely on whether the courts and state insurance regulators view HCSMs as insurance, which is one of the key legal questions this Article examines. In the last fifteen years, just two state supreme courts have issued reported decisions on whether a health care sharing ministry provides a contract for insurance.[44]

In 2010, the Supreme Court of Kentucky considered whether the Christian Care Ministry and its Medi-Share program provided a "contract for insurance" in the case of *Commonwealth v. Reinhold*.[45] Kentucky's Supreme Court held Medi-Share did provide a "contract for insurance" and did not fall within Kentucky's Religious

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[37] *Samaritan Ministries Ordered to Stop Offering Unauthorized Insurance in Washington State*, WASH. OFFICE OF THE INS. COMM'R (Apr. 1, 2011), http://www.insurance.wa.gov/about-oic/news-media/news-releases/2011/4-01-2011.html.

[38] Andrews, *supra* note 31.

[39] Vanessa Ho, *State Shuts Down Health-Care Sharing Ministry*, SEATTLE POST INTELLIGENCER (Apr. 1, 2011), http://www.seattlepi.com/local/article/State-shuts-down-health-care-sharing-ministry-1319041.php.

[40] *See infra* Appendix B.

[41] S.S.B. 5122, 2011 Leg., 62nd Sess. (Wash. 2011); Wash. Office of the Ins. Comm'r, *Order to Cease and Desist Rescinded*, (2011), http://www.insurance.wa.gov/oicfiles/orders/2011orders/11-0075.pdf.

[42] *See* Wash. Rev. Code § 48.43.009 (West 2012); S.S.B. 5122, *supra* note 41.

[43] *See* Commonwealth v. Reinhold, 325 S.W.3d 272 (Ky. 2010), *reh'g denied*; Barberton Rescue Missions, Inc. v. Insurance Div. of the Iowa Dep't of Commerce, 586 N.W.2d 352 (Iowa 1998), *reh'g denied*.

[44] Christian Bhd. Newsletter v. Williams, 634 A.2d 938 (Del. 1993), *aff'g* Christian Bhd. Newsletter v. Levinson, C.A. No. 92A-06-016 (Del. Super. Ct. Feb. 4, 1993) (considering and finding Christian Bhd. Newsletter (CBN) to be insurance). This Article will not examine in detail the New Castle County Superior Court order behind the Delaware Supreme Court's unpublished order in *Christian Bhd. Newsletter,* focusing instead on the reported *Reinhold* and *Barberton* cases.

[45] *Reinhold*, 325 S.W.3d at 273.

Publication Exemption for HCSMs.[46] The Kentucky Supreme Court's 5-2 ruling overturned a divided Kentucky Court of Appeals' ruling.[47] Justices Scott and Cunningham dissented from the *Reinhold* majority.[48] The dissent argued Medi-Share was not insurance[49] and should receive shelter under Kentucky's Religious Publication Exemption.[50]

In 1998, Iowa's Supreme Court also considered whether another HCSM was simply providing a "contract for insurance," the Christian Brotherhood Newsletter (CBN), in *Barberton Rescue Missions, Inc. v. Insurance Division of the Iowa Department of Commerce*.[51] Iowa's Supreme Court considered "(1) whether a Christian newsletter, through which medical costs are spread among its subscribers, constitutes an insurance contract; and (2) whether a recently enacted statute . . . exempts the newsletter from regulation . . . "[52] The Supreme Court of Iowa concluded the CBN plan was not insurance because the health care sharing ministry lacked the key element of insurance, the assumption of risk.[53] As the *Barberton* court affirmed the lower court's ruling on this ground, it declined to consider whether Iowa's Insurance Code exempted such plans from regulation.[54]

III. WHAT ARE HEALTH CARE SHARING MINISTRIES?

A. Christian Care Ministries - Medi-Share

Medi-Share is a "'sharing ministry' providing Affordable, Biblical Healthcare."[55] "[P]eople voluntarily join the program … to help pay the medical bills of other members."[56] Medi-Share is not licensed to sell insurance and thus avoids the regulatory requirements and oversight to which insurance companies are subject.[57] Prospective Medi-Share members fill out an application form, and Medi-Share reviews this information to determine applicant eligibility.[58] "[T]he application form serves as a 'commitment' contract whereby the applicant promises to abide by certain Medi[-]Share rules and regulations while participating in the program."[59] The "commitment contract" places these responsibilities on Medi-Share members:

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[46] *Id.*

[47] *Id.* at 279, *referring* to Commonwealth v. Reinhold, 2008 WL 4530900 (Ky. Ct. App. Oct. 10, 2008).

[48] *Id*.

[49] *Id.* at 280-81.

[50] *Id.* at 281-82.

[51] *Barberton Rescue Missions*, 586 N.W.2d at 352.

[52] *Id.* at 353, *citing* Iowa Code § 505.22 (1997).

[53] *Id*. at 356-57.

[54] *Id.* at 357.

[55] *Reinhold*, 325 S.W.3d at 273.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

> I understand that I will be responsible each month to access the member website, which identifies a fellow Christian who will be receiving my gift toward their medical need. I will endeavor to pray for this person and to give him or her encouragement by mail. I understand that my fellow believers in Christ are relying upon the receipt of my monthly share by the first of each month.[60]

Medi-Share's commitment contract includes the following disclaimer:

> I understand that Christian Care Ministry (CCM) matches a Medi[-]Share member's medical need with other Members who have volunteered, in faith, to share in meeting needs through the biblical concept of Christian mutual sharing. I further understand that all money comes from the voluntary giving of Members, not from the Christian Care Ministry, and that the Christian Care Ministry is not liable for the payment of any medical bills . . . [61]

Medi-Share's application form "expressly states that a Medi-Share contract is not an insurance policy."[62] Medi-Share's contractual disclaimer provides further:

> ATTENTION—This publication is not issued by an insurance company, nor is it offered through an insurance company. This publication does not guarantee or promise that your medical bills will be published or assigned to others for payment. Whether anyone chooses to pay your medical bills is strictly voluntary. This publication should never be considered a substitute for an insurance policy. Whether or not you receive any payments for medical expenses and whether or not this publication continues to operate, you are responsible for payment of your own medical bills.[63]

Medi-Share's cost-sharing ministry, as it existed at the time of the trial record in the *Reinhold* case, operated as follows:

> Medi-Share members send monthly "share" payments directly to Medi-Share. The organization retains a percentage of each "share" to cover its administrative costs. Medi-Share places the rest of the "share" into a trust, with sub-accounts designated for each member. These sub-accounts function like escrow accounts.[64] When a Medi-Share member has a

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[60] *Id.* at 274 (the "rules and regulations include that the applicant be committed to being a Christian, live by 'biblical standards,' attend church regularly, not use tobacco or illegal drugs, and refrain from abusing legal substances such as alcohol").

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] Stephen Sullivan, General Counsel for Christian Care Ministries, Inc (Medi-Share), reports:

> Medi-Share's sharing process has substantially changed since the record in the *Reinhold* case was created. The use of the trust and member sub-accounts has been eliminated. Today, members deposit their sharing funds directly into their own personal checking account for sharing with other members. If funds are needed to pay

> medical expense, the member pays the medical provider the applicable co-pay. Then, the member sends a sharing request form directly to Medi-Share, who reviews the request to see if the medical bill is eligible for sharing under Medi-Share's guidelines. If so, Medi-Share then transfers sharing funds directly from the sub-accounts of members that shared to the sub-account of the member with the eligible medical bill. Medi-Share then issues a check from that member's sub-account directly to the member's medical provider/s. Medi-Share determines which member sub-accounts are used to fund the payment of eligible members' sharing requests; individual members have no control over which sharing requests are paid from their sub-accounts. Thus, Medi-Share members do not designate specific member recipients to receive their donation from their sub-account. Medi-Share has member guidelines that define what types of medical bills are eligible for sharing among the members, provides for deductibles, and explains the yearly and lifetime caps on member sharing. Medi-Share's guidelines encourage members to use medical services within a group of Preferred Providers, and do so by providing penalties for using out-of-network providers.[65]

B. The Christian Brotherhood Newsletter - Christian Healthcare Ministry

Christian Healthcare Ministries (CHM) is a non-profit ministry, founded in 1981. CHM was the first nation-wide[66] Health Care Sharing Ministry.[67] Originally, CHM went by the name "The Christian Brotherhood Newsletter" (CBN) and the Newsletter's members were termed "subscribers."[68] The ministry adopted the name Christian Healthcare Ministries in 2006 and its participants are now called "members."[69] CHM's foundational Bible verse is Galatians 6:2: "[b]ear one another's burdens and so fulfill the law of Christ."[70] CHM also "points to the New

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> a medical bill, the funds are transferred directly between members' individual checking accounts, with the check to the provider being issued from the checking account of the member with the bill. Members never send their sharing funds to Medi-Share, and Medi-Share never receives their sharing funds.

E-mail from Stephen Sullivan, Gen. Counsel, Christian Care Ministries, Inc. (Medi-Share), to Benjamin Boyd (Sept. 10, 2012 12:32 MT) (on file with author).

[65] *Id.*

[66] Nation-wide HCSMs are distinguished from local or church-based health care sharing. There are a number of Mennonite church groups who have shared health care expenses on a local basis for over fifty years. E-mail from Brian Heller, Gen. Counsel, Samaritan Ministries Int'l, to Benjamin Boyd (Sept. 4, 2012, 09:36 MT) (on file with author).

[67] E-mail from Rev. Howard Russell, President and Chief Exec. Officer, Christian Healthcare Ministries, to Benjamin Boyd (Aug. 10, 2012 09:58 MT) (on file with author).

[68] *Id.*

[69] *Id.*

[70] *Id.*, *citing Galatians* 6:2.

Testament book of Acts, in which early Christians shared among themselves to meet each other's needs."[71]

CHM's members "share in meeting each other's eligible medical bills up to $125,000 per illness."[72] CHM also operates "a separate program called Brother's Keeper which enables members to share per-illness expenses up to $1 million."[73] CHM does not reject membership applications because of age or medical conditions.[74] "At the highest level of service in [CHM's] main program[,] the financial costs are $150 per individual [and are] capped at $450 per family regardless of the number of immediate family members."[75] CHM staff determines whether a member's medical bills are eligible for cost-sharing based on CHM's ministry guidelines.[76] Each member sends his or her monthly financial gifts to CHM, which then sends the shared reimbursement for medical bills directly to a CHM's member – who pays his or her health care provider directly.[77] CHM posts its financial information on its website through Guidestar, a service that publishes such information for non-profit organizations.[78]

When CHM operated as the Christian Brotherhood Newsletter, each Newsletter contained the following disclaimer:

> I understand that the *Christian Brotherhood Newsletter* is a publication and not an insurance company. Any help I may receive will come directly from other subscribers and not the publisher. I understand the publisher will not be responsible to send me any money and will have no obligation to me, other than to publish medical needs members have chosen to share, for certain members of my family.[79] I understand that the Christian Brotherhood program does not provide, in any way, a contract for indemnification of my medical expenses, death benefit or any other loss. No subscriber is personally responsible to send gifts to the need recommended to them in the newsletter. I am not guaranteed payment for any need of mine that is published in the newsletter. I participate voluntarily to practice Christian principles as the Bible teaches and to contribute to others' needs. I agree that I have no legal recourse against any subscriber or the publisher, even if I do not receive any money for

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[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* Guidestar publishes information about non-profit organizations. *See* GUIDESTAR, http://www.guidestar.org/ (last visited April 10, 2013) (Guidestar's report on Christian Healthcare Ministries is available at: http://www.guidestar.org/organizations/34-1964742/christian-healthcare-ministries.aspx)

[79] This sentence limits CBN's/CHM's obligation to its members to the provision of certain publishing services. The following two sentences excludes indemnification by CBN, and excludes assumption of the risk by CBN's membership as well.

> needs of mine submitted for publication in the newsletter. I understand that no contract for indemnification involving the *Christian Brotherhood Newsletter*, staff, employees or subscribers exists.[80]

CHM's current disclaimer is slightly shorter than the above disclaimer the ministry previously used.[81]

IV. WHAT LAW APPLIES TO HCSMS?

This section briefly summarizes the law that governs health care sharing ministries. Legal challenges to HCSMs implicate two focused areas of law: the first being the law providing HCSMs with "safe-harbor" protections from state insurance regulation and the second being the law governing the nature of insurance.

First, in over 40% of the states, HCSMs are governed by so-called "safe harbor" laws.[82] The Alliance of Health Care Sharing Ministries explains that these laws "are an important legislative avenue to protecting health care sharing ministries."[83] The Alliance maintains that, "it is impossible" for HCSMs to meet "the same requirements as insurance companies . . . without destroying the voluntary, ministerial nature of our ministries."[84] The provisions of the safe harbor statutes vary slightly from state to state. Virginia's statutory definition of HCSMs, enacted in 2008, is a typical example:

> [a]s used in this chapter, "health care sharing ministry" means a health care cost sharing arrangement among individuals of the same religion based on their sincerely held religious beliefs, which arrangement is administered by a non-profit organization that has been granted an exemption from federal income taxation pursuant to § 501(c)(3) of the Internal Revenue Code of 1986 and that:

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[80] Barberton Rescue Missions, Inc. v. Ins. Div. of the Iowa Dep't of Commerce, 586 N.W.2d 352, 353-354 (Iowa 1998).

[81] *Legal Notices*, CHRISTIAN HEALTHCARE MINISTRIES, http://www.cbnews.org/legal notices.aspx. The current online disclaimer reads:

> Christian Healthcare Ministries (hereinafter "CHM"), a not-for-profit religious organization, is not an insurance company. No ministry operations or publications are offered through or operated by an insurance company. CHM does not guarantee or promise that your medical bills will be shared or assigned to others for financial gifts. Whether any CHM member chooses to share the burden of your medical bills will be entirely voluntary. As such, CHM should never be considered as a substitute for an insurance policy. Whether you receive any financial gifts for medical expenses and whether CHM continues to operate, you are always liable for any unpaid bills.

CHM also employs several state-specific legal notices. *Id.*

[82] E-mail from John Creath, Pub. Policy Specialist, Samaritan Ministries, to Benjamin Boyd (July 20, 2012, 14:49 MT) (on file with author). As of August 2012, 21 states have exemptions for HCSMs. *See, e.g.*, *Current State Issues*, THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, http://www.healthcaresharing.org/issues/index.php?State=None; s*ee infra* Appendix B.

[83] *Current State Issues*, *supra* note 82.

[84] *Current State Issues*, *supra* note 82.

> 1. Limits its membership to individuals who are of a similar faith;
> 2. Acts as an organizational clearinghouse for information about members who have financial or medical needs and matches them with members with the present ability to assist those with financial or medical needs, all in accordance with the organization's criteria;
> 3. Provides for the financial or medical needs of a member through payments directly from one member to another. The requirements of this subdivision 3 may be satisfied by a trust established solely for the benefit of members, which trust is audited annually by an independent auditing firm;[85]
> 4. Provides amounts that members/subscribers may contribute with (i) no assumption of risk or promise to pay among the members and (ii) no assumption of risk or promise to pay by the organization to the members;
> 5. Provides written monthly statements to all members that list the total dollar amount of qualified needs submitted to the organization by members for their contribution; and
> 6. Provides in substance the following written disclaimer on or accompanying all promotional documents distributed by or on behalf of the organization, including applications and guideline materials:
> "Notice:
> This publication is not insurance, and is not offered through an insurance company. Whether anyone chooses to assist you with your medical bills will be totally voluntary, as no other member will be compelled by law to contribute toward your medical bills. As such, this publication should never be considered to be insurance. Whether you receive any payments for medical expenses and whether or not this publication continues to operate, you are always personally responsible for the payment of your own medical bills."[86]

The next section of the Virginia Code contains the "safe harbor" for HCSMs:

> [t]he provisions of this title shall not apply to a health care sharing ministry. A health care sharing ministry that, through its publication to members, solicits funds for the payment of medical expenses of other members, shall not be considered to be engaging in the business of insurance for purposes of this title and shall not be subject to the jurisdiction of the Commission.[87]

In contrast, the state of Washington adopted a terse safe harbor law for HCSMs: "[h]ealth care sharing ministries are not health carriers as defined in RCW 48.43.005 or insurers as defined in RCW 48.01.050. For purposes of this section, "health care

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[85] VA. CODE ANN. § 38.2-6300 (West 2012). This provision in Virginia's safe harbor statute varies from Kentucky's "Religious Publication" exemption, KY. REV. ST. ANN. § 304.1-120(7)(d) (If Kentucky's statute included this clause, the *Reinhold* case should have gone the other way).

[86] VA. CODE ANN. § 38.2-6300 (West 2012).

[87] VA. CODE ANN. § 38.2-6301 (West 2012).

sharing ministry" has the same meaning as in 26 U.S.C. Sec. 5000A.[88] A complete list of the states with HCSM exemptions follows this Article in Appendix B.[89]

Second, legal challenges to HCSMs historically have implicated a key legal concept in insurance law: the assumption of risk. The majority of states view the assumption of risk as an essential or foundational element of an insurance contract.[90] The D.C. Circuit Court of Appeals noted "[t]he primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk."[91] A California court viewed "the element of shifting of the risk of loss" as an essential element of insurance.[92] A Florida court stated: "[h]azard is essential . . . [i]f there is no risk, . . . there can be [no] insurance."[93] The Illinois Court of Appeals stated, "the presence of risk is the essence of an insurance contract."[94] The Kansas Supreme Court explained, "the assumption of a risk" is "the principal object and purpose" of the insurance business.[95] This presence – or absence – of the "primary characteristic . . . of insurance" determines whether HCSMs are insurance.[96] If HCSMs possess this

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[88] WASH. REV. CODE. § 48.43.009 (West 2012) (referencing the Patient Protection and Affordable Care Act's definition of health care sharing ministries, 26 U.S.C.A. § 5000A, (West 2012)). Washington's safe harbor statute defers to Congress' definition of "health care sharing ministry" in PPACA, which arguably preempts any state legislative definition to the contrary.

[89] *See infra* Appendix B.

[90] *See infra* Appendix A.

[91] Carter v. State Farm Mut. Auto. Ins. Co., 808 A.2d 466, 472 (D.C. Ct. App. 2002), *quoting* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979); *see also* Louisiana Safety Ass'n of Timbermen Self-Insurers Fund v. Louisiana Ins. Guar. Ass'n, 17 So. 3d 350, n.7 (La. 2009) (stating that "[t]he primary characteristic of the business of insurance is the transferring or spreading of risk. So long as this characteristic is present, the business of insurance is not limited to traditionally recognized areas of insurance," *citing* Klamath–Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1285 (9th Cir. 1983)).

[92] Richardson v. GAB Bus. Serv., Inc., 207 Cal. Rptr. 519, 523 (Cal. Ct. App. 1984) (citation omitted); *see also,* Warnig v. Atlantic Cnty. Special Serv., 833 A.2d 1098, 1104 (N.J. Super. 2003) ("[t]he essential nature of insurance is that risk is shifted to the insurer for the payment of a premium. It is a gamble.")

[93] Interstate Fire & Cas. Co. v. Abernathy, 93 So. 3d 352, 359 (Fla. Ct. App. 2012); *quoting* Jordan v. Group Health Ass'n, 107 F.2d 239, 245 (D.C. Cir. 1939) ("there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated conceptions of insurance and indemnity require these element[s]").

[94] St. Paul Fire & Marine Ins. Co. v. Lefton Iron & Metal Co., Inc., 694 N.E.2d 1049, 1054 (Ill. Ct. App. 1998), *citing* U.S. Liability Ins. Co. v. Selman, 70 F.3d 684, 690 (1st Cir. 1995) ("[a]ccordingly, where there is no risk of loss, as where a loss occurred prior to the policy taking effect, insurance ceases to serve its purpose of risk-spreading.")

[95] State *ex rel*. Londerholm v. Anderson, 408 P.2d 864, 875 (Kan. 1966), *citing* 44 C.J.S. *Insurance* § 59; *see also,* Barberton Rescue Missions, Inc. v. Ins. Div. of the Iowa Dept. of Commerce, 586 N.W.2d 352, 355 (Iowa 1998) ("to be considered insurance, the assumption of risk by the promoter must be the "principal object and purpose of the program," *citing* Appleman & Appleman, *Insurance Law & Practice* § 7002 at 14 (1981)).

[96] Louisiana Safety Ass'n of Timbermen Self-Insurers Fund v. Louisiana Ins. Guar. Ass'n, 17 So.3d 350, n.7 (La. 2009) ("[t]he primary characteristic of the business of insurance is the

characteristic, "the business of insurance is not limited to traditionally recognized areas of insurance."[97] Yet, if HCSMs lack this shifting or assumption of risk, "there is not an insurance contract."[98]

This Article now turns to consider how courts have regarded HCSMs, beginning first with the *Reinhold* opinion from Kentucky.

V. HOW HAVE COURTS TREATED HEALTH CARE SHARING MINISTRIES?

A. Commonwealth v. Reinhold: Medi-Share is Insurance

The primary issue in *Reinhold* was "whether Medi-Share provides a contract for insurance . . . ."[99] The *Reinhold* majority explained, "[t]he lower court decisions . . . incorrectly determined that the Medi-Share program did not shift risk because each individual member remains personally liable for paying his own medical bills."[100] The *Reinhold* majority opined that the lower courts overlooked "the risk-shifting nature of the 'commitment' contract that [Medi-Share] members enter into . . . and thus the lower courts erroneously concluded that the process does not constitute a 'contract for insurance' . . . ."[101]

First, the *Reinhold* majority noted that the wording of Medi-Share's "commitment" contract, standing alone, was not controlling.[102] Rather, "[i]t is the

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transferring or spreading of risk. So long as this characteristic is present, the business of insurance is not limited to traditionally recognized areas of insurance."), (*citing* Klamath–Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1285 (9th Cir. 1983).

[97] Louisiana Safety Ass'n of Timbermen Self-Insurers Fund, 17 So.3d at n.7.

[98] Blackwelder v. City of Winston-Salem, 420 S.E.2d 432, 435 (N.C. 1992) ("One characteristic of an insurance contract is the shifting of a risk from the insured to the insurer. If no risk is shifted there is not an insurance contract.").

[99] Commonwealth v. Reinhold, 325 S.W.3d 272, 276 (Ky. 2010), *citing* KY. REV. STAT. ANN. § 304.1-030 (defining insurance as "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils called 'risks,' or to pay or grant a specified amount or determinable benefit or annuity in connection with ascertainable risk contingencies, or to act as surety.")

[100] *Reinhold*, 325 S.W.3d at 276.

[101] *Id.*

[102] *Id.* at 277 (*citing* 43 AM. JUR. 2d *Insurance* § 4 (1982)):

> [i]t is immaterial, or at least not controlling, that the term "insurance" nowhere appears in the contract the nature of which is to be determined; indeed, the fact that it states that it is not an insurance policy is not conclusive, and a company may be found to be engaged in an insurance business even though it expressly disclaims any intention to sell insurance. Neither are the terms or mode of payment of the consideration determinative of the question whether the contract is one of insurance. The nature of a contract as one of insurance depends upon its contents and the true character of the contract actually entered into or issued—that is, whether a contract is one of insurance is to be determined by a consideration of the real character of the promise or of the act to be performed, and by a consideration of the exact nature of the agreement in light of the occurrence, contingency, or circumstances under which the performance becomes requisite, and not by what it is called.

43 AM. JUR. 2d *Insurance* § 4 (1982).

actual nature and effect of the "commitment" [103] contract that determines whether it is one for insurance."[104] The Kentucky Supreme Court noted: "one cannot change the nature of insurance business by declaring in the contract that it is not insurance."[105] The *Reinhold* majority focused on three key aspects of Medi-Share's program: Medi-Share member obligations; what Medi-Share members may receive in return for keeping their obligations; and Medi-Share's alleged use of actuarial tables.[106]

As for Medi-Share's member obligations, the commitment contract "obligates Medi-Share members to pay their monthly 'share' by the first of the month because their 'fellow believers in Christ' *rely* upon that payment to satisfy their medical needs."[107] And as to what members receive, "[i]n return for paying the monthly "share," Medi-Share members remain eligible to receive payment for their medical needs through the program."[108] The *Reinhold* majority opined,

> [t]his process clearly shifts the risk of payment for medical expenses from the individual member to the pool of sub-accounts from which his expenses will be paid. Thus, regardless of how Medi-Share defines itself or what disclaimers it includes in its literature, in the final analysis, there is a shifting of risk.[109]

Addressing Medi-Share's alleged use of actuarial tables, the majority analyzed Medi-Share's high level of success in paying members' claims, evidently due to the use of these statistical actuarial tables.[110] The majority stated that Medi-Share used

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[103] *Reinhold*, 325 S.W.3d at 277. (*quoting* Wheeler v. Ben Hur Life Ass'n., 264 S.W.2d 289, 291 (Ky. 1953)):

> [b]roadly speaking . . . when a company, society, or association, either voluntary or incorporated, and known as a relief, benevolent or benefit society, or by some similar name, contracts for a consideration to pay a sum of money upon the happening of a certain contingency, and the prevalent purpose and nature of the organization is that of insurance, it will be regarded as an insurance company, and its contracts as insurance contracts, regardless of the manner or mode of payment of consideration or of loss or benefit.

Wheeler, 264 S.W.2d at 291.

[104] *Reinhold*, 325 S.W.3d at 277 (*citing* Barberton Rescue Mission, Inc. v. Ins. Div. of the Iowa Dep't of Commerce, 586 N.W.2d 352 (Iowa 1998)). Interestingly, Kentucky's *Reinhold* majority cited Iowa's *Barberton* decision, but reached the exact opposite conclusion as the Iowa Supreme Court. *Id*.

[105] *Reinhold*, 325 S.W.3d at 277 (*quoting* Allin v. Motorists' Alliance of America, 29 S.W.2d 19, 23 (Ky. 1930)). The sole question was "whether the matters and things enumerated in the contract … constitute the business of insurance …." *Id*. at 21.

[106] Email from Stephen Sullivan, Gen. Counsel, Christian Care Ministries, Inc. (Medi-Share), to Benjamin Boyd (Sept. 10, 2012 12:32 MT) (on file with author) (Medi-Share actually does not use actuarial tables to calculate member shares).

[107] *Reinhold*, 325 S.W.3d at 277 (emphasis original).

[108] *Id.*

[109] *Id.*

[110] *Id.*

actuarial tables to calculate each member's monthly "share" at a "level commensurate with anticipated future member medical claims."[111] The majority believed the use of actuarial tables operated to shift risk like a traditional insurance company does.[112] With that rationale, the majority restated their holding that Medi-Share shifts risk between Medi-Share members "in the same manner traditional health insurance contracts shift risk between policyholders."[113]

In response, Medi-Share argued their disclaimer indicates that no risk shifting occurs.[114] The disclaimer states "Medi-Share takes no responsibility for the payment of the members' medical bills."[115] The *Reinhold* majority acknowledged the disclaimer perhaps shields Medi-Share from "any liability for its members' medical bills."[116] Nonetheless, the majority observed this disclaimer "does not overcome the fact that through the Medi-Share program the individual members pool resources together to distribute the risk of major medical bills amongst each other."[117] The *Reinhold* majority observed, "one cannot change the nature of an insurance business by simply declaring in the contract that it is not insurance."[118]

In sum, the *Reinhold* majority found that Medi-Share's "'commitment' contract was one for insurance" under Kentucky law for two main reasons.[119] First, through the commitment contract, Medi-Share members "undertake[] to pay or indemnify another as to loss from certain specified contingencies or perils called 'risks'."[120] Second, Medi-Share itself also "'undertakes' to actually pool the members' monthly "shares" together and pay members' actual medical bills as claims for payment are submitted."[121] The *Reinhold* majority concluded, "[t]hus, the "commitment" contract is, in practice and function, one for insurance."[122]

B. Commonwealth v. Reinhold: Medi-Share Does Not Qualify for the Religious Publication Exemption

Kentucky's Supreme Court considered, secondly, assuming that Medi-Share was a "contract for insurance," whether it was exempt from state regulation under Kentucky's statutory Religious Publication Exception.[123] The exception provides that no provisions of Kentucky's Insurance Code apply to "[a] religious publication

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[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 278.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* (*citing* KY. REV. ST. ANN. § 304-1-030).

[121] *Reinhold*, 325 S.W.3d at 278.

[122] *Id.*

[123] *Id.* (*citing* KY. REV. ST. ANN. § 304.1-120(7)(d)).

(as identified in this subsection), or its subscribers, that limit their operations to those activities, and . . . [p]ays for the subscribers' financial or medical needs by payments directly from one (1) subscriber to another . . . ."[124]

The *Reinhold* majority opined, "for Medi-Share to qualify for the Religious Publications Exception, it must meet every criterion listed. . . . Medi-Share does not."[125] The *Reinhold* majority found Medi-Share's members failed to pay subscriber's needs "directly from one (1) subscriber to another."[126] The Kentucky court reasoned, "[t]o satisfy the requirement of subsection (d), the religious publication must be set up so that one subscriber sends the money for assistance to the other subscriber without having the money passing through an intermediary."[127] The Kentucky high court concluded "Medi-Share . . . does not qualify for the Religious Publication Exception."[128]

1. The Reinhold Dissent: Medi-Share is Not Insurance

The *Reinhold* dissent, authored by Justice Scott and joined by Justice Cunningham, believed Medi-Share was not in the business of insurance[129] and maintained Medi-Share did not fall within "the ambit of definitional insurance."[130]

First, Justice Scott believed Medi-Share was not insurance because "the relationship between Medi-Share and its subscribers does not amount to a distribution of risk between the policy holder (the subscribers) and Medi-Share (the conduit to the pool of subscribers)."[131] Justice Scott, quoting the U.S. Supreme Court, described insurance as "an arrangement for transferring and distributing risk"[132] that "has the effect of transferring or spreading a policyholder's risk."[133] The

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[124] *Reinhold*, 325 S.W.3d at 278-79.

[125] *Id.* at 279 (*citing* Harris v. Commonwealth, 793 S.W.2d 802, 809 (Ky. 1990) ("This conclusion is inescapable because otherwise the General Assembly would have used the disjunctive 'or' instead of the conjunctive 'and'").

[126] *Id.*

[127] *Id.*

[128] *Id.* Kentucky's Supreme Court reasoned:

> Medi-Share does not operate in this manner. Medi-Share serves as an intermediary by which monthly "shares" from members are collected and held until being used to pay other members' needs. Medi-Share determines which needs are paid, how they are paid, and when they are paid. Each "subscribers' needs" are thus not paid directly from one subscriber to another, but through Medi-Share.

Id.

[129] *Id.* at 280 (Scott, J., dissenting).

[130] *Id.*

[131] *Id.*

[132] *Id.* (*citing* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979)):

> [t]he primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it."

dissent argued: "the distribution of risk between the policy holder and the insurer" is "central to the United States Supreme Court's analysis of the 'business of insurance.'"[134] Justice Scott believed "the system set up by Medi-Share shifts the risk from one subscriber (the insured) to the pool of subscribers (the insurers) . . . ."[135] The dissenting justice concluded, "Medi-Share is in the business of promoting and managing a cost-sharing organization . . . not . . . the business of insurance itself."[136]

Justice Scott explained that Medi-Share members, not the Medi-Share organization, bear the risk.[137] The dissent based this on Medi-Share's commitment contract, which states Medi-Share takes no responsibility for the payment of the members' medical bills.[138] Both the *Reinhold* majority and dissent recognized this disclaimer shields Medi-Share from liability for its members' bills.[139] The dissent pressed further: "what risk does Medi-Share, as an entity, bear? . . . clearly none."[140] Justice Scott maintained the majority did not distinguish exactly *who* distributed or bore the risk: "the majority reasons that the contract language alone does not overcome 'the fact that through the Medi-Share program the individual members pool resources together to distribute the risk of major medical bills *amongst each other*.'"[141] Scott agreed there was a shifting of risk, but argued, "this does not support a legal finding that Medi-Share is in the business of insurance, but rather that Medi-Share is in the business of administrating and managing a cost-sharing organization on behalf of others—in this instance, people of faith."[142]

Group Life & Health Ins. Co., 440 U.S. at 211.

[133] *Reinhold*, 325 S.W.3d at 280 (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743 (1985))

> [o]ur federal counterpart has identified three criteria that indicate that a company is in the "business of insurance": (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry.

Metropolitan Life Ins. Co., 471 U.S. at 743.

[134] *Reinhold*, 325 S.W.3d at 280.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 274 (the Medi-Share commitment reads so: "I further understand that all money comes from the voluntary giving of Members, not from the Christian Care Ministry, and that the Christian Care Ministry is not liable for the payment of any medical bills.").

[139] *Id.* at 278, 280.

[140] *Id.* at 280-81.

[141] *Id.* at 281 (emphasis in original).

[142] *Id.* Justice Scott continued, "[i]n contrast, a true insurance company takes on risks and the company itself bears those risks, not the individually insured policy holders."

Second, Justice Scott believed "Medi-Share's contract does not meet the definition of insurance . . . ."[143] The dissent again focused on exactly *who* undertook to pay another for risks. Justice Scott referred to Kentucky's statutory definition of insurance [144] and maintained, "in order for Medi-Share to fit this definition, it would have to undertake to pay or indemnify another for risks, or to pay or grant a specified amount or to act as a surety."[145] However, the dissent concluded "Medi-Share does none of these . . . activities . . . assumed by the members of the pool, since each of them agrees to pay for the other's losses in exchange for other members paying for their losses."[146]

2. The Reinhold Dissent: If Medi-Share is Insurance, it Should Fall Under the Religious Publication Exemption.

Justice Scott believed Medi-Share substantially complied with the Religious Publication Exemption and would have considered "it exempt from state regulation."[147] He reasoned, "in denying Medi-Share the protection outlined in KRS 304.1–120(7), the majority makes much of sub-section (d), and particularly the fact that the subscribers of Medi-Share do not make payments directly to and from one another."[148] Justice Scott recognized Medi-Share's procedure passes payments through an "intermediary" rather than from subscriber to subscriber, but argued "that procedure does not force the conclusion that the payments are not directly made from one subscriber to another."[149]

Justice Scott reasoned that Medi-Share acts as a trustee, bank, attorney, or agent,[150] and believed "Medi-Share is a conduit rather than an intermediary."[151] Justice Scott argued, "this Court would not hold that simply because one acts through an agent or via a trustee that one has not acted in a direct manner."[152] The dissent noted Kentucky law impugns "upon the principal the acts of its agents as if they proceeded *directly* from the principal."[153] He reasoned that Medi-Share's discretionary authority on behalf of Medi-Share's subscribers does not make the actions undertaken any less direct.[154] Justice Scott also believed that Kentucky's

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[143] *Id.* at 281.

[144] *Id*. (*citing* Ky. Rev. St. Ann. § 304.1–030 (West 2013)).

[145] *Id*.

[146] *Id*.

[147] *Id.*

[148] *Id.* at 282.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.* (*quoting* Preferred Risk Fire Ins. Co. v. Neet, 90 S.W.2d 39, 42 (1935)), (emphasis in original).

[154] *Reinhold*, 325 S.W.3d at 282.

Religious Publications Exemption specifically allowed this type of delegation and discretion in the administration of such cost-sharing organizations.[155]

Justice Scott concluded that "Medi-Share is in substantial compliance with KRS 304.1–120(7) and the spirit of that rule."[156] The dissent believed the Religious Publication Exception's protections should not be stripped from Medi-Share "because payments are made at the direction of Medi-Share after subscribers have delegated this duty to Medi-Share, particularly when Medi-Share already statutorily possesses the authority to function in an administrative capacity."[157]

This Article now turns to *Barberton Rescue Mission, Inc. v. Insurance Division of Iowa*, where the Iowa Supreme Court considered whether the "Christian Brotherhood Newsletter," (CBN) which then operated under the Barberton Rescue Mission, was insurance under Iowa law.

C. Barberton Rescue Mission, Inc. v. Insurance Division of Iowa: the Christian Brotherhood Newsletter is Not Insurance

Iowa's Supreme Court focused on the initial question: "[i]s this insurance?"[158] In May 1992, Iowa's Insurance Division "charged Barberton with selling insurance without a license. It requested the imposition of civil penalties and insurance premium taxes."[159] The Insurance Division's final decision stated: "Barberton was in fact selling insurance and was subject to supervision. It found that Barberton was subject to payment of the premium tax under Iowa Code section 507A.9 . . . ."[160] Iowa's Supreme Court previously stated that a contract is one for insurance if: "it meets the following test: one party, for compensation, assumes the risk of another; the party who assumes the risk agrees to pay a certain sum of money on a specified contingency; and the payment is made to the other party or the party's nominee."[161] Iowa's Supreme Court noted "[i]n deciding whether a plan is insurance, its wording is not controlling."[162] Iowa's *Barberton* court acknowledged the court should:

> look through the form of the transaction to determine whether the relationship of insurer and insured exists. Whether the contract is one of

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[155] *Id*. KY. REV. ST. ANN. § 304.1-120(7)(c) requires that the religious publication:

> [a]ct[s] as an organizational clearinghouse for information between subscribers who have financial, physical, or medical needs and subscribers who choose to assist with those needs, matching subscribers with the present ability to pay with subscribers with a present financial or medical need; …

KY. REV. ST. ANN. § 304.1-120(7)(c) (West 2012).

[156] *Reinhold*, 325 S.W.3d at 282.

[157] *Id*.

[158] Barberton Rescue Missions, Inc. v. Insurance Div. of the Iowa Dep't of Commerce, 586 N.W.2d 352, 354 (Iowa 1998).

[159] *Id.*

[160] *Id.*

[161] *Id.* (*quoting* Iowa Contractors Workers' Comp. Group v. Iowa Ins. Guar. Ass'n, 437 N.W.2d 909, 916 (Iowa 1989)).

[162] *Id*.

> insurance must be determined from its purpose, effect, content, terminology, and conduct of the parties, and not from its designation therein, since a contract which is fundamentally one of insurance cannot be altered by the use or absence of words in the contract itself. The court must look also to the intention of the parties in making this determination.[163]

Iowa's Insurance Division advanced two key arguments against Barberton's appeal. First, the Insurance Division argued CBN looked like insurance to the average consumer.[164] Iowa's Supreme Court observed, "[d]espite this obvious attempt to avoid insurance terminology, the insurance division says that the plan should be subjected to its regulation."[165] "To use an old adage, if something looks like a duck, quacks likes a duck, and walks like a duck, it must be a duck; this program is insurance, according to the insurance division."[166] Analogously, the Insurance Division noted "provisions in the plan, such as deductibles, exclusions, coverage limitations, and monthly fees, which closely parallel provisions in traditional health insurance policies."[167] The Insurance Division concluded that "[t]o the average consumer, these features make the 'Newsletter' look like an insurance policy."[168] Iowa's Supreme Court reasoned, "[h]owever, even if a program looks like insurance, it is not necessarily so."[169] The Iowa Supreme Court's principal inquiry here was "not how the program appears but whether the risk of payment for medical expense is assumed by the promoter . . . [i]n fact, to be considered insurance, the assumption of risk by the promoter must be the 'principal object and purpose of the program.'"[170]

Secondly, the Insurance Division focused on an implied assumption of risk. The Insurance Division conceded CBN "expressly disavows any assumption of risk, but it argues that some of its written material could be interpreted as a representation that it would do so, thereby creating an implied agreement to assume health care costs."[171] The Insurance Division pointed to several representations by CBN that it believed "show an implied assumption of risk."[172] These representations were in a

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[163] *Id.* at 354-55 (*quoting Iowa Contractors*, 437 N.W.2d 909, 916, *supra at* n. 159 (further citations omitted)).

[164] *Id* at 354.

[165] *Id.* at 355.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* (*quoting* APPLEMAN, INSURANCE LAW & PRACTICE § 7002, at 14 (1981) (further internal citations omitted)).

[171] *Id.* (*citing* Irons v. Community State Bank, 461 N.W.2d 849, 855 (Iowa Ct. App. 1990) (implying contract arising from conduct of parties)). The majority in *Reinhold* read Medi-Share's commitment contract very much like Iowa's Insurance Division here read CBN's representations – to create an implied assumption of risk where the HCSM specifically denies any assumption of risk.

[172] *Id.* at 355.

form letter sent to CBN's subscribers who had not received payments from other subscribers and in the organization's informational materials furnished to prospective members.[173] The form letters sent to subscribers stated: "[t]he home office has paid for all members that have dropped our program this year. But if someone does not pay we need that information in order for the home office to pay for them."[174] In response, Iowa's Supreme Court reasoned, "[t]his statement provides only limited support for the division's position, however, because . . . the actual cost is likely borne by another member."[175] The *Barberton* court reached this finding because another form letter from CBN accompanied the checks for unmet needs where a member did not pay.[176] This second form letter indicated: "*[a] new joiner is filling their place and paying this need*."[177] In addition, the Newsletter furnished the following answers to general questions: "[q]uestion: WHAT HAPPENS IF SOMEONE DOES NOT SEND THEIR GIFT?"[178] CBN provided this answer: "[i]f someone does not send their check, you alert the home office and we send them three reminders. If they do not pay after the third reminder, they are dropped from the program and the *gift will be filled by a new member*."[179] The Iowa Supreme Court reasoned this material bore out the company's non-assumption of risk.[180]

Iowa's Insurance Division also relied on other "frequently asked questions" in the Newsletter's informational material, and argued the following was an implied promise to pay:[181]

> [q]uestion: WHAT AM I PROMISED FROM THE BROTHERHOOD? Nothing, but in the last 10 years all needs that qualified [and were] submitted to the Brotherhood for publication [have] had a 100% response.[182]

Iowa's Supreme Court disagreed: "[t]he company's statement does not promise to pay anything from its own funds. In any event, any payment by the company for a shortfall would be rare."[183] In addition, subscribers to the Newsletter had an amazing non-payment rate of only one-half of one percent.[184] The Supreme Court observed that "even if the company paid one-half of one percent of the claims, any assumption

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[173] *Id.* at 355-56.

[174] *Id.* at 355.

[175] *Id.*

[176] *Id.*

[177] *Id.* (emphasis in original).

[178] *Id.*

[179] *Id.* at 355-56 (emphasis in original).

[180] *Id.* at 355.

[181] *Id.* at 356.

[182] *Id.*

[183] *Id.*

[184] *Id.*

of risk that small could not be the 'principal object and purpose' of the agreement as required for it to be insurance."[185]

Iowa's Supreme Court opined, "[t]his is a case in which the insurance division seeks to superimpose on *all* agreements an assumption of risk that is expressly disavowed by the agreement itself."[186] The Iowa court concluded the Newsletter's plan "is not insurance,"[187] and held that Iowa's Insurance Division "failed to establish the key element of insurance, the assumption of risk."[188] As Iowa's Supreme Court affirmed the District Court's ruling on the above grounds, the Court found it is unnecessary to consider whether Iowa's statutory exemption for religious publications applied.[189]

VI. HOW SHOULD COURTS AND STATE REGULATORS TREAT HCSMS?

This Article now turns to examine how courts and state insurance regulators should treat HCSMs and argues that HCSMs should be treated as follows.

- First, courts and insurance regulators must recognize the legal problems that crop up when one equates HCSMs with insurance, evident in the *Reinhold* majority opinion.
- Second, courts and insurance regulators must recognize the logical problems that occur when one equates an HCSM with insurance, also evident in the *Reinhold* majority opinion.
- Third, given the general dearth of case law on HCSMs,[190] when faced with these issues, courts and insurance regulators should apply HCSM "safe harbor" statutes and standard insurance law.
- Fourth, courts and insurance regulators should protect HCSMs and their members under the freedom of religion, the freedom to contract, and the separation of powers doctrine. Courts and insurance regulators should defer to state Attorney General supervision of HCSMs as non-profit charitable organizations. In addition, PPACA's definition of health care sharing ministries most likely preempts state legislative definitions to the contrary.

A. Recognize the Legal Difficulties of Equating HCSMs with Insurance

So, how should courts legally treat HCSMs? First and foremost, courts should recognize the legal distinction between a definitional HCSM and definitional insurance. Over 40% of the states define HCSMs in some way and exempt them

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[185] *Id.* (*citing* APPLEMAN, *INSURANCE LAW & PRACTICE* § 7002, at 14 (1981) (further internal citations omitted)).

[186] *Id.* (emphasis original).

[187] *Id.* at 357.

[188] *Id.* at 356-57.

[189] *Id.*

[190] *Id*. at 353-54 (this dearth of case law evidently is by design. CBN's contract requires the subscribers to agree, "I have no legal recourse against any subscriber or the publisher, even if I do not receive any money for needs of mine submitted for publication in the newsletter.").

from insurance regulations.[191] As is evident from Virginia and Kentucky's "safe harbor" statutes, these religious publication statutes define HCSMs quite differently from insurance.[192] When a court fails to recognize the differences between an HCSM and insurance, problems arise. There are a number of legal problems with the *Reinhold* majority's legal rationale.

First, the foundational legal problem in *Reinhold's* majority opinion lies in the omission of any reference to the legal standards governing the interpretation of insurance contracts. If Medi-Share's commitment contract is a type of insurance, the Kentucky Supreme Court should have construed the Medi-Share commitment contract according to the law governing the interpretation of insurance contracts. Kentucky construes insurance contracts with these standards of law:

> [t]erms of insurance contracts have no technical meaning in law and are to be interpreted according to the usage of the average man and as they would be read and understood by him in the light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured. But this 'rule of strict construction against an insurance company certainly does not mean that every doubt must be resolved against it and does not interfere with the rule that the policy must receive a reasonable interpretation consistent with ... the plain meaning and/or language in the contract.' When the terms of an insurance contract are unambiguous and not unreasonable, they will be enforced.[193]

The *Reinhold* majority apparently disregarded these laws of interpretation when it decided that Medi-Share's "process" constituted insurance. First, the *Reinhold* court did not interpret Medi-Share's commitment contract "according to the usage of the average man,"[194] as it "would be read and understood by him." The "average man" here should not be the average insurance purchaser. Rather, the "average man" must be a Medi-Share member, who voluntarily agreed in the Medi-Share commitment contract "that Christian Care Ministry (CCM) matches a Medi-Share member's medical need with other Members who have volunteered, in faith, to share in meeting needs through the biblical concept of Christian mutual sharing."[195] Secondly, the *Reinhold* court did not give the commitment contract "a reasonable interpretation consistent with . . . the plain meaning and/or language in the contract."[196] How would "the usage of the average man" give a "reasonable interpretation" of the plain meaning of Medi-Share's disclaimer?

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[191] *See infra* Appendix B; *see also, What is a Health Care Sharing Ministry?*, THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES, http://www.healthcaresharing.org/hcsm (providing a brief description and key features of an HCSM).

[192] *See* VA. CODE ANN. § 38.2-6300 (2008); VA. CODE ANN. § 38.2-6301 (2008); KY. REV. ST. ANN. § 301.1-120(7)(d) (West 2012).

[193] Kentucky Ass'n of Cntys All Lines Fund Trust v. McClendon, 157 S.W.3d 626, 630 (Ky. 2005) (citations omitted) (some internal quotation marks omitted).

[194] *Id.*

[195] Commonwealth v. Reinhold, 325 S.W.3d 272, 274 (Ky. 2010).

[196] *McClendon*, 157 S.W.3d at 630.

> ATTENTION – This publication does not guarantee or promise that your medical bills will be published or assigned to others for payment. Whether anyone chooses to pay your medical bills is strictly voluntary.[197]

The meaning of this language is plain, unless a court seeks to find an assumption of risk and obligation where Medi-Share's contract language expressly disavows such.[198] Thirdly, in order to evade enforcing the Medi-Share contract as written, the *Reinhold* majority impliedly found the Medi-Share contract ambiguous and unreasonable. If Medi-Share indeed functions as a type of insurance, why did the *Reinhold* majority neglect to interpret Medi-Share's contract according to standard law governing the interpretation of insurance contracts? Further, if Medi-Share's contract was ambiguous and uncertain, the Kentucky Supreme Court certainly did not resolve those difficulties in favor of the alleged insureds – Medi-Share's members who voluntarily agreed to Medi-Share's contract. The bottom line is the *Reinhold* majority ignored the plain meaning of the Medi-Share contract – a contract that requires the conclusion reached by the *Reinhold* dissent and by Kentucky's Court of Appeals: Medi-Share is not insurance.[199] In conclusion, courts should give effect to HCSM member agreements and construe these agreements according to standard contract law.

The second legal problem – and it springs from the first – lies with the majority's failure to explain exactly how *the language* of "the commitment contract . . . *obligates* Medi-Share members to pay their monthly share."[200] Pollock's century-old observation is right on target: "[a]n unfortunate habit has arisen of using 'obligation' in a lax manner as co-extensive with duties of every kind."[201] Black's Dictionary defines obligation as "[a] legal or moral duty to do or not do something."[202] The Medi-Share commitment contract requires members to agree: "all money comes from the voluntary giving of Members."[203] Further, Medi-Share's disclaimer states, "[t]his publication does not guarantee or promise that your medical bills will be published or assigned to others for payment. Whether anyone chooses to pay your medical bills is strictly voluntary."[204] In other words, Medi-Share members agree

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[197] *Id.*

[198] Barberton Rescue Missions, Inc. v. Ins. Div. of the Iowa Dep't of Commerce, 586 N.W.2d 352, 356 (Iowa 1998) (in the words of the Iowa Supreme Court: "this is a case in which the insurance division seeks to superimpose on all agreements an assumption of risk that is expressly disavowed by the agreement itself").

[199] *See Reinhold*, 325 S.W.3d at 280 (Scott, J., dissenting).

[200] *Id.* at 277 (emphasis added).

[201] BLACK'S LAW DICTIONARY 1104 (8th ed. 2004) (*quoting* FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE 82 (1896)).

[202] BLACK'S LAW DICTIONARY 1104 (8th ed. 2004).

[203] *Reinhold,* 325 S.W.3d. at 274.

[204] *Id.*

their monthly share is either a strictly voluntary or a moral obligation, not a legal obligation or contractual guarantee.[205]

The *Reinhold* majority, however, reasoned that the contract obligated members to pay their monthly share because fellow believers in Christ "*rely* on that payment."[206] The majority's appeal to fellow believers relying on payment does not suggest a legal obligation, but rather a moral obligation. If the commitment contract features a legal obligation to assume the risk, then Medi-Share should have the right to compel members to pay shares when there is a shortfall. However, the *Reinhold* majority never suggested that Medi-Share's contract is legally enforceable for that purpose. If the majority construed the commitment contract as its stands, they would give effect to the plain language that disavows any guarantee of payment, rather than importing a non-existent member "obligation" through the presence of the word "rely." Thus, the *Reinhold* majority's reasoning is unclear.

Perhaps the Kentucky Supreme Court considered Medi-Share's commitment contract somewhat like a promissory estoppel, based on detrimental reliance.[207] In a promissory estoppel action, detrimental reliance serves as a substitute for consideration.[208] However, the legal doctrine of consideration often denies "enforcement to a promise to make a gift."[209] Medi-Share's members promise to

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[205] BLACK'S LAW DICTIONARY, *supra* note 202 (defining a moral obligation as, "[a] duty that is based only on one's conscience and that is not legally enforceable; an obligation with a purely moral basis, as opposed to a legal one").

[206] *Reinhold,* 325 S.W.3d at 277.

[207] McCarthy v. Louisville Cartage Co., 796 S.W.2d 10, 11 (Ky. Ct. App. 1990) (*citing* THE RESTATEMENT (SECOND) OF CONTRACTS § 90 (1965)) ("[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

[208] *Id.* at 12, *citing* CALAMARI AND PERILLO, THE LAW OF CONTRACTS, ch.6, § 99-§ 105 (Hornbook Series, 1970) ("[n]umerous oral and gratuitous promises have been enforced on this basis").

[209] THE RESTATEMENT (SECOND) OF CONTRACTS, § 90 cmt. f (1981) (comment f explains: "[s]uch a promise is ordinarily enforced by virtue of the promisee's reliance only if his conduct is foreseeable and reasonable and involves a definite and substantial change of position which would not have occurred if the promise had not been made."). Here, the doctrine of consideration would deny legal enforcement of Medi-Share's members' voluntary choice, or "obligation" to make a gift of their "share." First, if some Medi-Share members relied on other members' promises to make a voluntary gift, their conduct, perhaps foreseeable, would not be reasonable. Medi-Share members specifically agree: "I understand that . . . other Members . . . have volunteered, in faith, to share in meeting needs through the biblical concept of Christian mutual sharing. I further understand that all money comes from the voluntary giving of Members . . . ." *Reinhold*, 325 S.W.3d at 278. How would members reasonably rely on other members' promises, when Medi-Share's disclaimer states: "Whether anyone chooses to pay your medical bills is strictly voluntary." How could reliance be reasonable when Medi-Share's disclaimer warns: "Whether or not you receive any payments for medical expenses and whether or not this publication continues to operate, you are responsible for payment of your own medical bills?" Second, there can be no "definite and substantial change of position" if Medi-Share's members are the ones ultimately "responsible for payment of your own medical bills." Simply, if the theory of promissory estoppel or detrimental reliance lurked behind the *Reinhold* majority rationale, the facts simply do not support that theory.

make voluntary gifts and the doctrine of consideration should deny legal enforcement of an HCSM member's "promise" to make a gift. In essence, the *Reinhold* majority imported this member obligation based upon reliance into the Medi-Share contract. The contract specifically denies this type of member obligation.[210] The court's very loose reading of the Medi-Share contract underscores the first lesson: courts must give legal effect to the language of HCSM member contracts.

A third legal problem with the *Reinhold* majority lies in a failure to explain just how a "process" could "clearly" shift the risk of payment. Kentucky law requires the *contract* to shift the risk. Insurance is "*a contract* whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils called 'risks,' . . . ."[211] The *Reinhold* majority reasoned, "[i]n return for paying their monthly "share," Medi-Share members remain eligible to receive payment for their medical needs through the program."[212] Then, the majority declared, "[t]his process clearly shifts the risk of payment for medical expenses from the individual member to the pool of sub-accounts from which his expenses will be paid."[213] The majority failed to explain just how a *process* morphs into an *insurance contract*. Unlike a contractual shifting of risk, Medi-Share's "process" is a clearinghouse system by which the ministry distributes the members' voluntary gifts.[214] Simply, how can this process shift risks to a "pool of sub-accounts" when the members have no contractual obligation "to pay or indemnify another as to loss," but only a voluntary, moral obligation?

The fourth legal problem consists in the *Reinhold* majority's failure to identify *the insurer* in the Medi-Share's alleged insurance "process." In Kentucky, the word "'[i]nsurer' includes every person engaged as principal and as indemnitor, surety, or contractor in the business of entering into contracts of insurance."[215] Kentucky's statutory definition of insurance requires the insurer to "undertake[] to pay or indemnify" the insured.[216] However, the majority believed Medi-Share's process "shifts risk of payment . . . from the individual member to the pool of sub-accounts . . . ."[217] The majority believed the individual members "distribute[d] the risk of major medical bills amongst each other."[218] However, Kentucky's definition of "insurer" does not include "the pool of sub-accounts" or the "individual members" of a HCSM. The majority's reasoning raises a few questions, which follow:

- First, are Medi-Share's individual members now "insurers" under the *Reinhold* majority opinion? Under Kentucky's

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[210] *Reinhold*, 325 S.W.3d at 278.

[211] KY. REV. ST. ANN. § 304.1-030 (West 2012) (emphasis added).

[212] *Reinhold*, 325 S.W.3d at 277.

[213] *Id.*

[214] *Id.* at 282.

[215] KY. REV. ST. ANN. § 304.1-040 (West 2012).

[216] KY. REV. ST. ANN. § 304.1-030 (West 2012).

[217] *Reinhold*, 325 S.W.3d at 277.

[218] *Id.* at 278.

definition of "insurer," Medi-Share's individual members are not "engaged as principal . . . or contractor in the business of entering into contracts of insurance."[219] This conclusion does not legally follow.

- Second, is Medi-Share as an organization the "insurer" under the *Reinhold* majority opinion? The majority did not conclude Medi-Share was the insurer. The majority stated, "[t]he conclusion that Medi–Share functions not as a charity, but as a type of insurance is well supported by the evidence in the record."[220] In what sense could Medi-Share *as an organization* "function . . . as a type of insurance?" Kentucky law defines insurance as a contract, not an organization, and not as a function or process.[221]
- Third, did the *Reinhold* majority decision create a new type of insurance? It appears that with Medi-Share's "process" based "insurance," insurance exists without an insurer, at least in Kentucky. Does any type of insurance exist that *distributes* the risk amongst policyholders (or Medi-Share members), but does not *shift* the risk of payment to Medi-Share, the alleged "insurer?" The Circuit Court of Appeals for the District of Columbia reasoned, "[i]nsurance . . . involves distribution of the risk, but distribution without assumption hardly can be held to be insurance. These are elemental conceptions and controlling ones."[222] Thus, insurance normally consists of five elements: "1) [a]n insurable interest; 2) [a] risk of loss; 3) [a]n assumption of risk by the insurer; 4) [a] general scheme to distribute the loss among the larger group of persons bearing similar risks" and "5) [t]he payment of a premium for the assumption of risk."[223] The *Reinhold* majority focused on one element: the distribution of the risk.[224] It is noteworthy what the majority did *not* find in Medi-Share's process: Medi-Share as an "insurer" does not assume the risk, and Medi-Share's members do not pay a premium for Medi-Share to assume the risk.
- Fourth, does Kentucky's new "process" type of insurance also "perhaps" shield Medi-Share, the insurer, from any liability for the "insured's" medical bills? The *Reinhold* majority grudgingly acknowledged Medi-Share's disclaimer "perhaps" shields the HCSM from "any liability for its members' medical bills."[225]

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[219] KY. REV. STAT. ANN. § 304.1-040 (West 2012).

[220] *Reinhold*, 325 S.W.3d at 278.

[221] KY. REV. ST. ANN. § 304.1-030 (West 2012).

[222] Jordan v. Gr Health Ass'n*,* 107 F.2d 239, 245 (D.C. Cir. 1939).

[223] Guaranteed Warranty Corp., Inc. v. State *ex rel.* Humphrey, 533 P.2d 87, 90 (Ariz. Ct. App. 1975) (*citing* W. VANCE, HANDBOOK ON INSURANCE § 1, at 2 (2d ed. 1930).

[224] *See Reinhold,* 325 S.W.3d at 276-278.

[225] *Id.* at 277.

> However, the *Reinhold* majority ignored the effect of Medi-Share's disclaimer, as the dissent charged.[226] Whether Medi-Share's disclaimer does shield the HCSM from liability for its members' medical bills, or only "perhaps" shields Medi-Share from liability for such, Medi-Share's need-sharing process "hardly can be held to be insurance."[227]

In conclusion, the legal problems noted above will be manifest when a court or administrative officer seeks to squeeze an HCSM into the relevant definition of insurance. These legal problems lead to certain logical problems, which this Article turns to now.

B. Recognize the Logical Difficulties Of Equating HCSMs with Insurance

Now, how should courts logically treat HCSMs? This Article argues that courts should apply the basic laws of logic to HCSM cases. The *Reinhold* majority opinion ably demonstrates the logical briar patches awaiting when a court overlays the definition of insurance on an HCSM. The first briar patch features the logical fallacy of equivocation, which occurs when one reasons, "just because the same word or form of the same word is used in two different contexts, it must mean the same thing in both contexts."[228] The *Reinhold* majority took a description of Medi-Share's escrow account system and equivocated that with the definition of insurance, so: "Medi-Share 'undertakes' to actually pool the members' monthly 'shares' together and pay the actual medical bills as claims for payment are submitted."[229] First, when a HCSM "undertakes" to "pay," it does not mean the same thing as in an insurance company undertakes to pay medical bills. HCSMs pay medical bills from member shares; insurance companies pay medical bills from their own cash reserves.[230] Second, on a more basic level, pooling member shares in escrow-type accounts and paying medical bills from those accounts is simply not part of Kentucky's definition of insurance. With this, the majority of Kentucky's Supreme Court essentially re-wrote Kentucky's statutory definition of insurance. This highlights an obvious question – if the court had to equivocate and effectively re-write the definition of insurance in order for a HCSM to be found "insurance," shouldn't the opposite conclusion be reached?

In another example of equivocation, the *Reinhold* majority's recitation of the facts referred to Medi-Share's trust sub-accounts as "sub-accounts designated by individual member;" "another member's sub-account;" "member sub-accounts;" "individual sub-account[s];" and twice as "his sub-account."[231] The majority even

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[226] *Id.* at 277-78.

[227] *Jordan*, 107 F.2d at 245.

[228] Regester v. Longwood Ambulance Co., Inc., 751 A.2d 694, 700 (Pa. Commw. Ct. 2000); *see also,* State v. Star Enter., 691 So. 2d 1221, 1226 (La. Ct. App. 1996) (defining the logical fallacy of equivocation as "an argument in which one term, in this case "exemption," is used with differences of meaning, often very subtle").

[229] *Reinhold*, 325 S.W.3d at 278.

[230] 43 AM. JUR. 2D *Contracts* § 1 (2013).

[231] *Reinhold*, 325 S.W.3d at 275.

described the "sub-accounts function[ing] in many ways like an escrow account."[232] However, in the legal analysis, the *Reinhold* majority opinion never described Medi-Share's trust sub-accounts as "individual sub-accounts," or "sub-accounts designated by individual member," but instead characterized these accounts as "*the pool of sub-accounts*."[233] Somehow, Medi-Share's individual trust accounts lost their individual status between the recitation of the facts and the opinion. The majority stated that Medi-Share "pool[s] the members' monthly 'shares'" and further, Medi-Share's "individual members pool resources together."[234] The *Reinhold* majority never explained exactly how "sub-accounts designated by individual member" that function "like an escrow account" could morph subtly into this "pool of sub-accounts" – a pool that entirely escaped mention in the majority's recitation of the facts. Indeed, if Medi-Share places member gifts directly into "sub-accounts designated by individual member," like escrow accounts, it would seem Medi-Share actually would meet every part of Kentucky's Religious Publication statute, as the *Reinhold* dissent maintained.

The second briar patch involves the logical fallacy of composition. This logical fallacy occurs when one infers that what is true of the parts is therefore also true of the whole.[235] The Kentucky Court of Appeals elsewhere stated this fallacy: "[b]ecause the atoms of this book are invisible, the book must be invisible."[236] In essence, the *Reinhold* majority reasoned that because Medi-Share's *members* assume the risk, Medi-Share *as an entity* assumes the risk. The majority committed the fallacy of composition by equating Medi-Share's members with the singular "*one*" who "undertakes to pay or indemnify another."[237] Kentucky defines insurance as: "a contract whereby *one* undertakes to pay or indemnify *another* as to loss from certain specified contingencies or perils called 'risks,' . . . ."[238] *Reinhold's* majority opined: "Medi-Share's members "undertake[] to pay or indemnify another as to loss from certain specified contingencies or perils called 'risks'."[239] Yet, concerning the members, Medi-Share's contract states: "all money comes from the voluntary giving

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[232] *Id.*

[233] *Id.* at 277 (emphasis added).

[234] *Id.* at 278.

[235] *See, e.g.*, Chew v. Gates, 27 F.3d 1432, 1469 (9th Cir.1994) (Trott, C.J., concurring and dissenting):

> [t]hird, the fallacy of composition is mischievously at work insofar as each emasculated and quarantined piece of the whole is used to compel an adulterated and invalid conclusion. If this were a proper way to reason, which it manifestly is not, one could easily make the case that World War II wasn't really a significant threat to our national security, just as the majority opinion claims Chew's behavior that afternoon did not pose an " immediate safety threat to anyone."

[236] A & A Mech., Inc. v. Thermal Equip. Sales, Inc., 998 S.W.2d 505, 514 n.6 (Ky. Ct. App. 1999) ("[l]ogicians refer to such invalid inferences from parts to whole as the fallacy of composition: Because the atoms of this book are invisible, the book must be invisible.").

[237] KY. REV. ST. ANN. § 304.1-030 (West 2012) (emphasis added).

[238] *Id.*

[239] *Reinhold*, 325 S.W.3dat 278.

of Members . . . ."[240] Further: "[w]hether anyone chooses to pay your medical bills is strictly voluntary."[241] Concerning Medi-Share, the contract states: "I further understand that all money comes from the voluntary giving of Members, not from the Christian Care Ministry, and that the Christian Care Ministry is not liable for the payment of any medical bills . . . ."[242] The *Reinhold* dissent and majority believed Medi-Share's members assumed the risk. However, the majority's conclusion – that Medi-Share functions as a type of insurance – does not follow. Thus, what the majority believed was true of Medi-Share's members (the parts) – that they assumed the risk – is not therefore also true of Medi-Share (the whole).[243]

The third briar patch features the fallacy of special pleading, which is "[a]n argument that is unfairly slanted toward the speaker's viewpoint because it omits unfavorable facts or authorities and develops only favorable ones."[244] The *Reinhold* majority simply omitted nearly all the unfavorable facts and authorities and developed only the arguments sufficient to reach their desired conclusion, thus committing this logical fallacy. The Circuit Court of Appeals for the District of Columbia, in an analogous situation, described this fallacy as "looking only at the risk element, to the exclusion of all others present or their subordination to it."[245] In particular, why was the *Reinhold* majority unwilling to acknowledge the legal effect of Medi-Share's disclaimer and Medi-Share's substantial compliance with Kentucky's religious publication statute? The majority reluctantly admitted when saying that, "[t]his disclaimer, while perhaps shielding Medi–Share from any liability for its members' medical bills . . . ."[246] The *Reinhold* dissent pointed this out: "the majority discards this disclaimer under the guise that Medi-Share's function overrides the contract language."[247] The dissent then impliedly charged the majority with rendering the religious publication statute that required the disclaimer a

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[240] *Id.* at 274.

[241] *Id.*

[242] *Id*.

[243] Apply the majority's reasoning to standard insurance. It highlights the logical difficulties. The purchasers of insurance, (the parts) the "insured[s]" do not "undertake[] to pay or indemnify another as to loss . . . ." *Id.* at 278. Rather, it is insurance companies (the "whole") that undertake to pay or indemnify others as to loss, and not the purchasers of insurance, the insured[s] (the parts).

[244] BLACK'S LAW DICTIONARY 1526 (9th ed. 2009).

[245] Jordan v. Gr Health Ass'n., 107 F.2d 239, 248 (D.C. Cir. 1939) ("[t]he fallacy is in looking only at the risk element, to the exclusion of all others present or their subordination to it. The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose.").

[246] *Reinhold*, 325 S.W.3d at 278.

[247] *Id.* at 281 n.1.

> And while I believe that an insurance company may not disclaim its insurance function simply by employing a disclaimer in its policies, I also recognize that the General Assembly, in passing this statute, considers the disclaimer more pertinent than a normal one used by a non-religious institution. Otherwise, subsection (f) becomes superfluous, and will be read as an irrelevant section of Kentucky law. *Id.*

superfluous and irrelevant section of Kentucky law.[248] Medi-Share's disclaimer states:

> ATTENTION—This publication is not issued by an insurance company, nor is it offered through an insurance company. This publication does not guarantee or promise that your medical bills will be published or assigned to others for payment. Whether anyone chooses to pay your medical bills is strictly voluntary. This publication should never be considered a substitute for an insurance policy. Whether or not you receive any payments for medical expenses and whether or not this publication continues to operate, you are responsible for payment of your own medical bills.[249]

Medi-Share's disclaimer – one the Kentucky legislature requires such health care sharing ministries to publish prominently[250] – simply knocks out the *Reinhold* majority's apparent straw man member that "relies" on other member's obligation. Indeed, the majority's argument "is unfairly slanted" toward their "viewpoint because it omits unfavorable facts or authorities and develops only favorable ones."[251]

The fourth and last logical briar patch features the fallacy of guilt by association.[252] The *Reinhold* majority committed this fallacy by citing certain egregious examples from insurance case law and comparing them with HCSMs.[253] The fallacy occurs by reasoning that if HCSMs "hang out" with insurance scams, then HCSMs must be insurance scams.[254] Admittedly, employing this fallacy makes the legal analysis concerning HCSMs easier and shorter. However, arguing for guilt by association does not properly bring HCSMs under the laws of insurance, just as hanging out in a crack house does not thereby a drug dealer make.[255]

The Kentucky Supreme Court cited law[256] from *Allin v. Motorists' Alliance of America*, where the question was whether "the contract . . . constitute[s] the business of insurance . . . ."[257] The Alliance solicited auto owners to enter into contracts in which the Alliance promised to provide for the costs of certain legal services.[258] The Alliance agreed to provide legal services for charges such as manslaughter, reckless

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[248] *Id.*

[249] *Id.* at 274.

[250] KY. REV. STAT. ANN. § 304.1-120 (West 2012).

[251] BLACK'S LAW DICTIONARY 1526 (9th ed. 2009).

[252] Walker v. Commonwealth, 52 S.W.3d 533, 539 (Ky. 2001) ("[n]o doubt this plethora of evidence was presented in an effort to inflame the jury, and convict Walker of guilt by association. He was hanging out in a "crack house," therefore he must be a drug dealer.").

[253] *Reinhold*, 325 S.W.3d at 277.

[254] *Id.; see also* Walker v. Commonwealth, 52 S.W.3d at 539.

[255] *Walker*, 52 S.W.3d at 539.

[256] *Reinhold*, 325 S.W.3d at 277.

[257] Allin v. Motorists' Alliance of Am., 29 S.W.2d 19, 21 (Ky. Ct. App. 1930).

[258] *Id.* at 20.

driving, collisions, and personal injury.[259] However, the contract disclaimer stated: "[t]his contract is not one of indemnity or insurance . . . ."[260] The *Allin* appellee pointed out that "the contract . . . states . . . it is not an insurance policy."[261] The Kentucky Court of Appeals responded, "[n]o one can change the nature of insurance business by declaring in the contract that it is not insurance."[262] The court further observed, "[i]t is not good logic to argue that the furnishing of an attorney to represent the owner of an automobile in his defense in court actions is not a loss indemnified against. Insurance companies are authorized to indemnify against such losses . . . ."[263] In short, "no one would argue that it was not insurance."[264] The *Allin* court determined "the provision of the contract to provide for services of an attorney, free of charge upon the happening of certain contingencies, is insurance . . . ."[265] The *Allin* court believed "[t]he essential purpose" of "the contract in controversy" was "not to render personal services, but to indemnify against loss and damage resulting from the defense of actions."[266]

The *Reinhold* court also cited the particularly egregious case of *Wheeler v. Ben Hur Life Association*,[267] where Kentucky's Court of Appeals considered "whether the Association was in effect an insurance company . . . ."[268] The Association had been licensed as a fraternal benefit society exempt from Kentucky's insurance laws.[269] The *Wheeler* court noted, however, that "the law looks at substance instead of form, and is not deceived by the gloss of words."[270] The Association provided for a lodge system, ritualistic forms of work, and a representative form of government; had no capital stock; and organized ostensibly for the benefit of its members.[271] However, the Association had "been engaged in the life insurance business" while giving only superficial attention to lodge requirements.[272] The agents received salaries and commissions on premiums; commissions were based on sales, not the

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[259] *Id.* at 20-21.

[260] *Id.* at 21. The disclaimer continued: "and this Alliance is not responsible for any court costs or damages recovered against the owner or expenses incurred in connection with the litigation, except the services of the Alliance's attorney." *Id.*

[261] *Id.* at 23.

[262] *Id.* at 22.

[263] *Id*.

[264] *Id.*

[265] *Id.* at 23.

[266] *Id.* at 21.

[267] Commonwealth v. Reinhold, 325 S.W.3d 272, 277 (Ky. 2010).

[268] Wheeler v. Ben Hur Life Ass'n, 264 S.W.2d 289, 291 (Ky. Ct. App. 1953).

[269] *Compare Id.* at 290, *with* K.R.S. § 304.1-120 (West 2012), which states, "[n]o provision of this code shall apply to: (1) Fraternal benefit societies (as identified in Subtitle 29), except as stated in Subtitle 29." KY. REV. ST. ANN. § 304.1-120 (West 2012).

[270] *Wheeler*, 264 S.W.2d at 291.

[271] *Id.*

[272] *Id.*

number of members procured; the Association's efforts were directed toward selling insurance, not recruiting members; and the Association placed little emphasis on lodge membership.[273] The Association performed their "ritualistic work . . . perfunctorily."[274] No members had been initiated since 1941; lodge meetings were held without notice; and the lodge conducted little or no solicitation of social members and desired only insured members.[275] The Kentucky Court of Appeals concluded that "the primary function of the Ben Hur Life Association is to sell insurance, and that the Association was an insurance company operating under the guise of a fraternal benefit society."[276]

The essential facts of *Allin* and *Wheeler* differ significantly from *Reinhold*. In *Allin*, the "Alliance" specifically agreed to provide for the costs of legal services if a member faced certain charges.[277] In contrast, Medi-Share as an organization agrees to provide no payment when Medi-Share subscribers face certain medical costs.[278] The "commitment" contract obligates Medi-Share to provide certain services to its members, but not indemnification or payment.[279] Thus, the facts of *Allin* require the opposite conclusion: Medi-Share promises or guarantees no payment; therefore, Medi-Share is not insurance. The Ben Hur Life Association in the *Wheeler* case is a false analogy to Medi-Share, which was engaged in all of its statutorily required duties as a HCSM under Kentucky's "Religious Publication" statute, save one. In contrast, the Ben Hur Life Association in *Wheeler* was only superficially engaged in its statutorily required duties as a fraternal lodge.[280] Under these facts, the *Reinhold* majority would be hard pressed to maintain "the primary function of [Medi-Share] is to sell insurance, and that [Medi-Share] was an insurance company operating under the guise of a [health care sharing ministry]."[281]

In sum, if the law looks at substance instead of form,[282] then Medi-Share in substance is a HCSM under Kentucky law, not an insurance company. Not only do cases like *Allin* and *Wheeler* invoke the fallacy of guilt by association, such cases are a red herring, a logical distraction from the real legal issues involved in cases on HCSMs.[283] The substantive legal issue for HCSMs is whether the ministry complies with the applicable "safe harbor" statute under state law which this Article examines below in §4.B.2. In conclusion, the laws of logic should not be somehow suspended for court cases and administrative actions regarding HCSMs. The *Reinhold* majority

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[273] *Id.* at 291-92.

[274] *Id.* at 292.

[275] *Id.*

[276] *Id.*

[277] Allin v. Motorists' Alliance of Am., 29 S.W.2d 19, 20-21 (Ky. Ct. App. 1930).

[278] Commonwealth v. Reinhold, 325 S.W.3d 272, 278 (Ky. 2010).

[279] *Id.* at 281 (Scott, J., dissenting).

[280] *Wheeler,* 264 S.W.2d at 292.

[281] *Id.*

[282] *Id.* at 291.

[283] State v. Long, 575 A.2d 435, 476 (N.J. 1990) ("[t]he dictionary defines a "red herring" as "something that distracts attention from the real issue.").

opinion contains several examples of the defective logic involved in trying to equate an HCSM within the definition of insurance, and both the courts and state regulators would do well to avoid such logical thickets.

C. What to Do With the Dearth of Case Law on HCSMs

The general dearth of case law on HCSMs means the Kentucky Supreme Court dealt with HCSMs by making analogies to certain egregious cases involving other agencies, as noted above. Interestingly, the *Reinhold* majority did cite Iowa's *Barberton* case, the only other reported case on point.[284] The *Reinhold* majority did not distinguish *Barberton's* holding or explain why the *Reinhold* case required the opposite result. However, no other reported cases deal with the specific issues of whether HCSMs are engaged in the business of insurance and whether the "safe harbor" statute applies.[285] In order to deal with this lack of case law, this Article first examines precedent from the U.S. Supreme Court, secondly argues that courts should apply the "safe harbor" statutes to HCSMs, and lastly offers some analysis on whether HCSMs should be compared to other types of organizations to determine whether HCSMs are insurance, as the Kentucky Supreme Court did.

1. Some Guidance from U.S. Supreme Court Precedent

The assumption of the risk is a key element for insurance.[286] The key question here is, given the fact HCSMs specifically disclaim any assumption of the risk, whether HCSM members indeed assume the risk of payment of medical costs among themselves. However, while the assumption of risk is a key element, it is not the *only* element of insurance.[287] Three U.S. Supreme Court precedents in the area of insurance law provide helpful guidance for cases beyond the borders of Iowa and Kentucky.

First, the U.S. Supreme Court defined insurance as "an arrangement for transferring and distributing risk" in *Group Life & Health Company v. Royal Drug Company*.[288] In *Group Life*, certain pharmacists alleged some pharmacy agreements violated the Sherman Act.[289] The question was whether these pharmacy agreements were the "business of insurance."[290] The *Group Life* Court stated, "[t]he primary elements of an insurance contract are the spreading and underwriting of a

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[284] *Reinhold*, 325 S.W.3d at 277.

[285] A Westlaw Classic search performed on Feb. 19, 2013 in ALLCASES using the term "HCSM and insurance" brought up no relevant results.

[286] *See infra* Appendix A.

[287] Jordan v. Group Health Ass'n, 107 F.2d 239, 248 (D.C. Cir. 1939) ("[t]he fallacy is in looking only at the risk element, to the exclusion of all others present or their subordination to it. The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose.").

[288] Group Life & Health Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979) (quoting 1 G. RICHARDS, THE LAW OF INSURANCE § 2 (W. Freedman 5th ed., 1952).

[289] *Id*.

[290] *Id.* at 210.

policyholder's risk."[291] The court explained, "[i]t is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it."[292] The Court further explained, "[t]he Pharmacy Agreements thus do not involve any underwriting or spreading of risk . . . they are not the "business of insurance."[293]

Second, the U.S. Supreme Court provided a more complete definition of "the business of insurance" in *Metropolitan Life Ins. Co. v. Massachusetts*.[294] Three relevant criteria indicate whether a particular practice falls within "the business of insurance:"

> (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry.[295]

Third, in *Securities and Exchange Commission v. Variable Annuity Life Insurance Company*, the U.S. Supreme Court considered whether variable annuities were "contracts for insurance."[296] Variable annuity benefit payments vary with the success of the investment.[297] The annuitant "cannot look forward to a fixed monthly or yearly amount."[298] Variable annuities share characteristics with fixed annuities, including periodic payments continuing until the annuitant's death or the end of a fixed term.[299] Issuers "assume the risk of mortality . . . an actuarial prognostication that a certain number of annuitants will survive to specified ages."[300] The annuity contract reflects the mortality prediction, which is a risk "assumed both by respondents and by those who issue fixed annuities."[301] The "[r]espondents . . . urge [this feature] . . . is basically an insurance device."[302] The U.S. Supreme Court disagreed: "absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company."[303] The Court concluded, "the concept of 'insurance' involves some investment risk-taking on the

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[291] *Id.*

[292] *Id*. (*quoting* 1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 1:3 (2d ed., 1959)).

[293] Royal Drug Co., 440 U.S. at 214.

[294] Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743 (1985).

[295] *Id*.

[296] Sec. and Exch. Comm'n v. Variable Annuity Life Ins. Co., 359 U.S 65, 68 (1959).

[297] *Id*. at 69.

[298] *Id*. at 70.

[299] *Id*.

[300] *Id*.

[301] *Id*.

[302] *Id.*

[303] *Id*. at 71.

part of the company." [304] The variable annuity companies guaranteed "nothing to the annuitant except an interest in a portfolio of common stocks . . . ."[305] Further, "[t]here is no true underwriting of risks, the one earmark of insurance . . . ."[306]

Analyzing these cases with respect to HCSMs reveals several things. First, HCSMs as organizations lack the primary element of insurance under *Group Life*: the underwriting of policyholder risk.[307] HCSMs lack the "characteristic of insurance" that enables "the insurer to accept each risk at a slight fraction of the possible liability upon it."[308] The *Reinhold* dissent correctly pointed out "Medi-Share takes no responsibility for the payment of the members' medical bills," and thus bears no liability or risk of loss.[309] In other words, HCSMs do not underwrite "policyholder risk." Further, HCSMs do not "accept each risk at a slight fraction of the possible liability upon it." Rather, Medi-Share and other HCSMs do not have even a fraction of possible liability for member medical bills, which are voluntarily shared by other members and not by these HCSMs themselves.

Second, under *Met Life*, for courts to consider an HCSM the practice of insurance, the HCSM has to have the effect of transferring or spreading a policyholder's risk and the practice must be an "*integral part*" of the relationship between the insurer and insured.[310] The *Reinhold* dissent and the majority effectively acknowledged Medi-Share's cost-sharing contract "has the effect of … spreading a policyholder's risk."[311] Yet, the dissent noted Medi-Share's assumption of risk did not occur "between the insurer and the insured."[312] The majority also stated it was the members, not Medi-Share, who "undertake[] to pay or indemnify another as to loss from certain . . . 'risks'."[313] Thus, under the *Reinhold* majority's view of these facts, Medi-Share's contractual "spreading of the risk" cannot be said to be an "integral part of the . . . policy relationship between the insurer and the insured." Thus, under the *Met Life* test, HCSMs do not fall within the "business of insurance."

Third, under *Variable Annuity*, HCSMs may have some "aspect[s] of insurance" – like variable annuities do.[314] Yet, these aspects are apparent, not real; superficial, not substantial, because HCSM contracts or member agreements have "no element of fixed return" obligatory upon the ministry, much like variable annuities. HCSMs are not involved in "investment risk-taking." Much like variable annuities, HCSMs essentially "guarantee nothing" to their members except the provision of certain services as a clearinghouse for information on medical needs. Admittedly, CBN's

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[304] *Id*.

[305] *Id*. at 72.

[306] *Id*. at 73.

[307] Group Life & Health Co. v. Royal Drug Co., 440 U.S. 205, 211(1979).

[308] *Id.*

[309] Commonwealth v. Reinhold, 325 S.W.3d 272, 280 (Ky. 2010).

[310] *Id.*

[311] *Id*. at 277, 280.

[312] *Id*. at 280.

[313] *Id*. at 278 (*quoting* KY. REV. ST. ANN. § 304.1–030).

[314] Sec. and Exch. Comm'n v. Variable Annuity Life Ins. Co., 359 U.S 65, 88 (1959).

disavowal of any guarantees is much stronger worded than Medi-Share's disavowal of guarantees.[315] Yet, there is no way to remain faithful to the language of these HCSM contracts and arrive where the *Reinhold* majority did. In short, HCSMs feature "no true underwriting of risks, the one earmark of insurance."[316] Much like variable annuities, "in hard reality the issuer of a [HCSM commitment contract] that has no element of fixed return assumes no true risk in the insurance sense."[317]

2. Courts Should Apply the "Safe Harbor" HCSM Statutes

Courts can easily make a detailed list of the need-sharing "processes" HCSMs engage in and from there maintain health care cost sharing constitutes the business of insurance by focusing on a few aspects of HCSMs.[318] Indeed, the *Reinhold* majority

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[315] CBN's member agreement states:

> I am not guaranteed payment for any need of mine that is published in the newsletter. I participate voluntarily to practice Christian principles as the Bible teaches and to contribute to others' needs. I agree that I have no legal recourse against any subscriber or the publisher, even if I do not receive any money for needs of mine submitted for publication in the newsletter.

Barberton Rescue Missions, Inc. v Ins. Div. of the Iowa Dep't of Commerce, 586 N.W. 2d 352, 353 (Iowa 1998). Medi-Share's member commitment contract states:

> [t]his publication does not guarantee or promise that your medical bills will be published or assigned to others for payment. Whether anyone chooses to pay your medical bills is strictly voluntary. ... Whether or not you receive any payments for medical expenses and whether or not this publication continues to operate, you are responsible for payment of your own medical bills.

Commonwealth v. Reinhold, 325 S.W.3d 272, 274 (Ky. 2010). Analogously, Samaritan Ministries' current member application states:

> I agree that neither I nor Samaritan Ministries have any legal power to force anyone to give to me for any need. Members give to other members voluntarily as an expression of obedience to their Christian faith, and it would be contrary to my Christian beliefs for any governmental authority to construe giving by members to be a contractual obligation.

Membership Application, SAMARITAN MINISTRIES.ORG http://samaritanministries.org/wp-content/uploads/2013/02/Member-App-201302.pdf (last visited Feb. 22, 2013).

[316] *Variable Annuity Life Ins. Co.*, 359 U.S at 88 (1959).

[317] *Id*. at 71.

[318] Christian Bhd. Newsletter v. Levinson, C.A. No. 92A-06-016 at 8-9 (Del. Super. Ct. Feb. 4, 1993) (on file with author). The Superior Court quoted the Administrative Hearing Officer's description of the CBN health-care sharing program:

> (1) Through its publications and other activities CBN creates a group or pool of subscribers – participants – in its programs. (2) It establishes standards for participation by subscribers. (3) It admits applicants to "membership" in the CBN program. (4) It determines the amount of each monthly payment (i.e. the Unit subscription) to be paid by each member. (5) CBN receives and processes applications or requests for payment, that is, for reimbursement of medical expenses incurred by participants in the CBN program. (6) CBN determines to what extent each application for reimbursement is within its operating criteria and thus can be approved. (7) Upon approval, CBN determines the total amount (of reimbursement) to be paid to a

pointed out just a few ways Medi-Share held similarities with insurance.[319] Instead, courts should consider whether the HCSM complies with their own statutory definition of HCSMs in a "safe harbor" statute.[320] When viewed from this angle, Medi-Share complied with Kentucky's "religious publication" statute in total, with only one exception.[321] The *Reinhold* majority held, "[i]t is clear from the statutory language of KRS 304.1–120(7) that for Medi-Share to qualify for the Religious Publications Exception, it must meet every criterion listed[322]. . . . Medi-Share does not."[323] The majority stated, "[e]ach 'subscribers' needs' are . . . not paid directly from one subscriber to another, but through Medi-Share. Since Medi-Share does not satisfy KRS 304.1–120(7)(d), it does not qualify for the Religious Publication Exception."[324]

However, the *Reinhold* majority did not point out any other subsection of K.R.S. § 304.1-120(7) that Medi-Share failed to comply with. Unlike the Ben Hur Life Association's inattention to its required fraternal duties in *Wheeler*, Medi-Share gave much more than superficial attention to its HCSM duties.[325] If the Kentucky *Reinhold* majority had discussed and then applied Kentucky's *entire* religious

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> member. (8) It allocates or assigns a specific amount of money to be paid by named members and directs those members to send the specified amount to a named person. (9) Upon arrival CBN advises the member seeking reimbursement that certain designated members will send moneys to him/her. (10) If the member seeking reimbursement does not receive, within three months, a check from a participant in the program, in the amount which CBN had directed, the CBN provides a substitute for the non-paying member. . . Consequently, given the liberal interpretation to be applied to the Insurance Code, it is clear that CBN's activities fall within those outlined in §§ 505(a) & (d).

Id.

[319] *See, e.g.*, *Reinhold*, 325 S.W.3d at 277-78 ("Medi–Share utilizes statistical actuarial tables to shift risk the same way a traditional health insurance company sets its premiums . . . . [n]either do we doubt that [members of Medi-Share] pay "shares" with the expectation of a financial return based on Medi–Share's history of claims payments in the form of the payment of their own medical bills . . . . Indeed, the thrust of the advertising is that [Medi-Share] is an economical alternative to conventional health insurance programs."). It should be noted however that Medi-Share does not use actuarial tables to calculate member "shares." Email from Stephen Sullivan, Gen. Counsel for Christian Care Ministries, Inc., to Benjamin Boyd (Sept. 10, 2012 12:32 MT) (on file with author).

[320] *See infra* Appendix B.

[321] K.R.S. § 304.1-120(7)(West 2012). Medi-Share's alleged lack of compliance with K.R.S. § 304.1-120(7)(d) is debatable, given the fact the *Reinhold* majority described Medi-Share's member accounts as "individual" accounts that function like escrow accounts, and then only later – without any referenced factual basis – described these accounts as a "pool." *Reinhold*, 325 S.W.3d at 275, 277 (Ky. 2010).

[322] "This conclusion is inescapable because otherwise the General Assembly would have used the disjunctive 'or' instead of the conjunctive 'and.'" *Reinhold*, 325 S.W.3d at 279, (*citing* Harris v. Commonwealth, 793 S.W.2d 802, 809 (Ky. 1990)).

[323] *Id*.

[324] *Id*.

[325] *Id.* at 274-77.

publication statute to Medi-Share, the majority should have observed that Medi-Share does the following things:

- Medi-Share is a religious publication identified in K.R.S. § 304.1-120(7) that limits their operations to those activities permitted by that statutory subsection.[326]
- Medi-Share is a non-profit religious organization,[327] limited to subscribers who are members of the same denomination or religion.[328]
- Medi-Share acts as an organizational clearinghouse for information between subscribers who have needs and subscribers who choose to assist with those needs.[329]
- Medi-Share matches subscribers with the present ability to pay with subscribers with a present need.[330]
- Medi-Share suggests amounts to give that are voluntary among the subscribers.[331]
- Medi-Share's need-sharing has no assumption of risk or promise to pay either among the subscribers or between the subscribers and the publication.[332]
- Lastly, Medi-Share provides the statutorily required disclosure on their applications, guidelines, publications, and promotional materials – which plainly states, "[t]his publication is not issued by an insurance company nor is it offered through an insurance company."[333]

In short, if the *Reinhold* majority would consider and apply each part of Kentucky's religious publication statute to Medi-Share, the rationale for the majority opinion would change along the following lines:

- First, the majority would acknowledge that Medi-Share functioned as a religious organization and charity, which they apparently denied.[334]
- Second, the majority would admit that Medi-Share functions as an "organizational clearinghouse," not an insurer, as they maintained.[335] How can Medi-Share function as "an

[326] KY. REV. STAT. ANN. § 304.1-120(7) (West 2012).

[327] KY. REV. STAT. ANN. § 304.1-120(7)(a).

[328] KY. REV. STAT. ANN. § 304.1-120(7)(b).

[329] KY. REV. STAT. ANN. § 304.1-120(7)(c); the *Reinhold* majority described Medi-Share as an "intermediary," but not as a "clearinghouse." *Reinhold*, 325 S.W.3d at 279.

[330] K.R.S. § 304.1-120(7)(c).

[331] K.R.S. § 304.1-120(7)(e) (emphasis added).

[332] K.R.S. § 304.1-120(7)(e).

[333] K.R.S. § 304.1-120(7)(f).

[334] K.R.S. § 304.1-120(7)(b); *Reinhold*, 325 S.W.3d at 279.

[335] *See Reinhold,* 325 S.W3d at 279.

intermediary" for purposes of being excluded from Kentucky's religious publication statute and at the same time somehow function as "a type of insurance" for purposes of meeting Kentucky's definition of insurance?

- Third, the majority would concede that Medi-Share as an "organizational clearinghouse for information" should "determine which needs are paid, how they are paid, and when they are paid."[336] If an HCSM cannot "determine which needs are paid, how they are paid, and when they are paid," how can HCSMs ever act as an "informational clearinghouse," matching subscribers who have needs and subscribers who assist with the needs?[337] In the words of the *Reinhold* dissent: "this delegation and discretion is expressly contemplated by KRS 304.1–120(7)(c) which recognizes and allows the administration of these type of cost-sharing organizations . . ."[338]
- Fourth, the majority would admit that Medi-Share only *suggests* amounts to give that are "voluntary among the subscribers," thus negating Medi-Share's members' alleged "obligation" which other members allegedly rely on, in spite of the contract language.[339]
- Fifth, the majority would concede that an assumption of risk or promise to pay exists neither among the subscribers or between the subscribers and the publication – thus, Medi-Share's members do not assume any risk or promise to pay anything – and neither does Medi-Share. The fourth point, if acknowledged, removes the key legal cornerstone from the *Reinhold* majority's holding.[340]
- Sixth, the majority would acknowledge that Medi-Share complied with Kentucky's statutorily required disclaimer. Yet, the *Reinhold* majority discarded "this disclaimer under the guise that Medi-Share's function overrides the contract language . . . ."[341]

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[336] *Id.*

[337] KY. REV. STAT. ANN. § 304.1-120(7)(c) (West 2012).

[338] *Reinhold,* 325 S.W3d at 283; *see also Id.* at 281 ("this type of management and delegation of authority is contemplated in KRS § 304.1–120(7)(c) . . .")

[339] *Id.* at 278.

[340] *Id*.

[341] *Id.* at 280 n.1 ("[t]he General Assembly of Kentucky promulgated and requires this disclaimer when religious institutions attempt to create these cost-sharing organizations . . . . I also recognize that the General Assembly, in passing this statute, considers the disclaimer more pertinent than a normal one used by a non-religious institution. Otherwise, subsection (f) becomes superfluous, and will be read as an irrelevant section of Kentucky law.")

In conclusion, the *Reinhold* majority ignored Medi-Share's substance as a HCSM and emphasized Medi-Share's minimal and superficial similarities to insurance.[342] The majority simply failed to give due consideration to Medi-Share's substantial compliance with Kentucky statute as a religious publication statutorily exempt from Kentucky's insurance regulations. Going forward, courts should give due consideration to whether the HCSM complies with its own statutory definition of HCSMs in these "safe harbor" statutes, rather than cataloguing the ways the health care sharing process may bear superficial similarities to insurance.

3. Should Courts Review other Analogous Case Law?

While case law regarding other organizations and practices can be instructive to a degree, courts and insurance regulators should exercise caution when analogizing HCSMs to other practices or agencies that courts have held to be insurance. Not only is this type of legal reasoning sloppy logic,[343] it is also relatively futile. The Circuit Court of Appeals for the District of Columbia declined to embark upon a similar inquiry: "[n]o good purpose would be served by an extensive review of cases dealing with multitudinous types of organization and function [sic] holding them to be or not to be engaged in some form of insurance business."[344] The Court reasoned, "[o]nly a very few deal with the specific issue presented here, namely, whether consumer cooperatives are so engaged" in the business of insurance.[345]

Likewise, should future litigation arise over HCSMs, courts and insurance regulators should confine themselves to the specific issues presented – the issues of whether the HCSM in question complies with the applicable "safe harbor" statutory exemption for HCSMs and whether HCSMs are indeed engaged in the business of insurance. This Article now turns to consider five additional reasons why the states should not regulate HCSMs as insurance.

VII. Some Final Considerations for Courts and State Insurance Regulators

A. The Freedom to Contract / Public Policy

First, HCSM agreements must receive legal protection under the freedom to contract.[346] Kentucky's Supreme Court recognized the freedom to contract is "safeguarded by the constitutional guaranty of 'pursuit of happiness,' so one has the right to refuse to accept a contract or to assume such liability as may be

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[342] *See also* Sec. & Exch. Comm'n v. Variable Annuity Life Ins. Co. of Am., 359 U.S. 65, 68 (1959) (where the variable annuities at issue had "an aspect of insurance. Yet it is apparent, not real; superficial, not substantial. In hard reality the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense.")

[343] *See supra* Part 4.A.2.

[344] Jordan v. Group. Health Ass'n, 107 F.2d 239, 248 (D.C. Cir. 1939) (*citing* the annotations in 63 A.L.R. 711 and 100 A.L.R. 1449, when faced with the question whether a certain consumer cooperative was insurance).

[345] *Id*.

[346] *See, e.g.,* Mullins v. Northern Ky. Inspections, Inc., No. 2009-CA-000067-MR, 2010 WL 3447630 at *1 (Ky. Ct. App. Sept. 3, 2010) (citation omitted) ("the doctrine of freedom to contract prevails and, in the absence of ambiguity, a written instrument will be enforced strictly according to its terms.")

proposed."[347] The *Reinhold* majority overlooked the fact that competent adults freely agreed to the Medi-Share agreement, which requires members to affirm they have "volunteered, in faith, to share in meeting needs through the biblical concept of Christian mutual sharing."[348] The acknowledgement continues: "I further understand that all money comes from the voluntary giving of Members, not from the Christian Care Ministry, and that the Christian Care Ministry is not liable for the payment of any medical bills."[349]

Simply, competent adults freely sign these "commitment contracts" and "membership applications," agreeing the HCSM is "not insurance" and agreeing to meet the needs of others of faith voluntarily through the sharing ministry. If people of faith seek their own "pursuit of happiness" and assume the obligations incumbent upon HCSM members, they have "the right to refuse to accept a contract or to assume such liability as may be proposed."[350] Strangely enough, HCSM members do not want the supposed benefit of insurance regulations encumbering their particular sharing ministry: "the consumers apparently needing the Department's protection seek an exemption from those regulations."[351] The HCSM members insurance regulators seek to protect freely signed contracts that do not implicate the restrictions of state insurance regulations. In such situations, both the courts and insurance regulators should not deny people of faith the right to contract as they wish and voluntarily share medical expenses.

Second, there are no public policy reasons to restrict HCSM member contracts and force HCSMs into the mold of insurance companies. Kentucky's Supreme Court defined "public policy" as: "the principles under which freedom of contract and private dealing are restricted by law for the good of the community."[352] Further, "[c]ertain classes of contracts, though not prohibited by the Constitution or statutes, are held by the courts to be against public policy on the ground that they promote unfairness and injustice, and are therefore mischievous in their tendency, and detrimental to the public good."[353] Do HCSMs promote unfairness or injustice? Are HCSMs detrimental to the public good? Interestingly, Iowa's Supreme Court in *Barberton* noted as an aside that "[t]he evidence is uncontradicted that no member complaints have been filed with the insurance division by any newsletter members."[354] Further, in *Reinhold*, the Kentucky Attorney General's office had

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[347] General Elec. Co. v. Am. Buyers Co-op., Inc., 316 S.W.2d 354, 354 (Ky. 1958) (citations omitted) (Kentucky's Supreme Court acknowledged that "[w]hile the term 'freedom of contract' does not appear in the federal or state constitutions, it is always embraced in the meaning of 'liberty' as employed in those instruments . . . .")

[348] Commonwealth v. Reinhold, 325 S.W.3d 272 at 274 (Ky. 2010).

[349] *Id*.

[350] *General Elec. Co.*, 316 S.W.2d at 361.

[351] *In re* Barberton Rescue Mission, Inc. No. 1-1004-14523-2, State of Minn. Office of Admin. Hearings for the Comm'r of Commerce, June 18, 2003.

[352] Central W. Cas. Co. v. Stewart, 58 S.W.2d 366, 367 (Ky. Ct. App. 1933) (internal citations omitted).

[353] *Id*.

[354] Barberton Rescue Missions, Inc. v. Insurance Div. of the Iowa Dep't of Commerce, 586 N.W.2d 352, 357 (Iowa 1998).

investigated no complaints against Medi-Share when the case was at the trial court level.[355]

Where there is no evidence of unfairness, injustice, mischievous tendencies, or detriment to the public good, as with the *Reinhold* and *Barberton* cases, then, as a matter of public policy, HCSM members' freedom to contract should not be restricted "for the good of the community." Instead, as a matter of policy, HCSM members must have the same freedom to contract as any other member of society. Where government has a duty to uphold the public policy of protecting consumers from potential scams or unscrupulous practices, the solution should not involve equating HCSMs with insurance, as these ministries are not insurance. Applying statutory regulations "designed to fit" insurance to the operations of cooperative HCSM organizations "could not be other than incongruous, or fatal" to the HCSMs.[356] "It would result, not in regulation, but in destruction of the organization."[357] Rather than destroying the voluntary, cooperative nature of HCSMs by forcing HCSMs into insurance regulations, state legislatures may achieve the general public policy goal of protecting consumers by requiring HCSMs to employ statutory disclaimers in their advertising materials.[358] State legislatures may also further this public policy goal by enacting specific statutory "safe harbor" exemptions from insurance regulations for HCSMs, as twenty-one states have done to date.[359]

B. The Freedom of Religion

HCSMs and their members should receive protection from insurance regulations under the constitutional freedom of religion. The three major HCSMs possess a distinctly religious focus and explain this in different ways.

Reverend Howard Russell, president of the Christian Healthcare Ministry, formerly CBN, stated the first health insurance policies surfaced around the 1920's.[360] In contrast to health insurance, Russell noted that Christians have been sharing one another's medical burdens for hundreds and hundreds of years.[361] The

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[355] Roger Alford, *Kentucky Churchgoers: Medi-Share Not an Insurance Program,* INSURANCE JOURNAL, Oct. 30, 2006, http://www.insurancejournal.com/news/southeast /2006/10/30/73618.htm (last visited June 22, 2012) (Vicki Glass, spokeswoman for the Kentucky Attorney General's Office, said her office has investigated no complaints).

[356] Jordan v. Group Health Ass'n, 107 F.2d 239, 248 (D.C. Cir. 1939) (regarding a certain consumer cooperative which the D.C. Circuit Court of Appeals found not to be insurance).

[357] *Id*.

[358] *In re* Barberton Rescue Mission, Inc. No. 1-1004-14523-2, State of Minn. Office of Admin. Hearings for the Comm'r of Commerce, June 18, 2003 (Administrative Law Judge Beck opined: "it appears that the explicit disclaimers used by CBN have avoided complaints in the past, and presumably should do so in the future. The Department has not shown how a warning would not suffice to meet its interest in protecting consumers and the public safety.").

[359] *See infra* Appendix B; s*ee also* The Alliance of Health Care Sharing Ministries, *What is a Health Care Sharing Ministry?*, http://www.healthcaresharing.org/hcsm (last visited July 14, 2012).

[360] Telephone Interview with Rev. Howard Russell, President, Christian Healthcare Ministries (July 25, 2012).

[361] *Id*.

Christian Healthcare Ministry also asserts, "[t]he New Testament says Christians should carry each other's burdens. That is the foundation of our voluntary cost-sharing ministry."[362] Likewise, Medi-Share maintains it promotes religious and biblical values because "[t]aking care of each other was a way of life for Christians in the [early] days of the Church."[363] Medi-Share members seek to fulfill the Biblical requirement, "[a]nd do not forget to do good and to share with others, for with such sacrifices God is pleased."[364] Medi-Share explains this requirement so:

> Christians continued to care for each other well into the twentieth century. But after World War II, government programs and insurance companies assumed the Church's role as caretaker. When medical costs soared, many churches found they lacked the resources to care for their members. Christians view not-for-profit ministries like Medi-Share as a way to reclaim their biblical mandate to care and provide for their brothers and sisters in Christ.[365]

Samaritan Ministries International founded its HCSM on the principle that "God is the ultimate Source of provision for every need encountered by the Christian. Even when help comes through a person, it ultimately comes from God."[366] Samaritan Ministries embraces the principle that "[a] medical need cannot be met with money alone. Prayer and encouragement are also needed."[367] Samaritan Ministries believes "[i]t is the responsibility of those within the Body of Christ to allow themselves to be used of God to help in meeting the needs of other Christians."[368]

While no reported cases on HCSMs deal with the freedom of religion,[369] in 2003, Minnesota Administrative Law Judge Greg Beck considered this argument as

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[362] Christian Healthcare Ministries, *How it Works*, CHRISTIAN HEALTHCARE MINISTRY, http://www.chministries.org/howitworks.aspx (last visited on July 12, 2012) (referring to *Galatians* 6:2).

[363] Medi-Share, *FAQs*, MYCHRISTIANCARE.ORG, http://mychristiancare.org/Medi-Share/Public_Content/Medi-Share_FAQs.aspx#1q2 (last visited July 12, 2012).

[364] *Id*. (*quoting Hebrews* 13:16).

[365] *Id*.

[366] Samaritan Ministries International, *Foundational Principles*, SAMARITAN MINISTRIES, http://www.samaritanministries.org/principles/ (last visited July 12, 2012).

[367] *Id*.

[368] *Id*.

[369] *But see* Christian Bhd. Newsletter v. Levinson, C.A. No. 92A-06-016 (Del. Super. Ct. Feb. 4, 1993) (on file with author). Delaware's Supreme Court implicitly addressed the freedom of religion when that court affirmed the Superior Court's decision in Christian Bhd. Newsletter v. Levinson. *See* Christian Bhd. Newsletter v. Levinson, No. 103,1993 (Del. Aug. 3, 1993) (unpublished order), *available at* http://de.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19930803_0004.DE.htm/qx. After finding CBN lacked standing to assert the religious First Amendment rights of its subscribers, the Superior Court in dicta addressed the applicability of the rule from *Employment Division v. Smith*, 494 U.S. 872, 878-879 (1990). Christian Bhd. Newsletter v. Levinson, C.A. No. 92A-06-016 at 10-11. "The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that law proscribes (or prescribes) conduct that is

applied to an HCSM.[370] In 2001, Minnesota's Commissioner of Commerce had issued a *Cease and Desist Order* against the Christian Brotherhood Newsletter [CBN], alleging "the newsletter was engaging in the business of insurance in Minnesota without a license…."[371] Two CBN subscribers, John and Lynne Cooke, petitioned to intervene in the matter.[372] The ALJ denied the Cooke's petition, yet allowed them to file a memorandum in support of CBN's *Motion for Summary Disposition*.[373] Ultimately, Judge Beck's recommendation both rescinded the *Cease and Desist Order* and granted CBN's *Motion for Summary Disposition*.[374]

It is important to note how Judge Beck dealt with this important legal issue for HCSMs as an example of how courts should respect HCSM members' freedom of religion. In this administrative matter, both CBN and the Cookes argued that the Minnesota Department of Commerce's attempt to regulate CBN as an insurance company violated both the First Amendment of the United States Constitution and the freedom of conscience clause in the Minnesota Constitution.[375] Judge Beck did not apply the rule from the *Employment Division v. Smith* case.[376] Instead, Judge Beck applied a "compelling state interest balancing test" and considered "whether the objector's belief is sincerely held, whether the state regulation burdens the exercise of religious beliefs, whether the state interest in the regulation is overriding or compelling, and whether the state regulation uses the least restrictive means."[377]

The first factor was not in dispute.[378] On the second factor, Judge Beck concluded that CBN and "the Cookes have demonstrated that regulation would

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religion prescribes (or proscribes)." *Id*. The Superior Court, applying *Smith*, held "the regulation of CBN's newsletter activities does not offend the U.S. or the Delaware Constitution in this regard. The Insurance Code does not seek to prescribe or proscribe religious beliefs of activities. It is valid and neutral in substance and in application." *Id*. at 11-12.

[370] *In re* Barberton Rescue Mission, Inc., No. 1-1004-14523-2, State of Minn. Office of Admin. Hearings for the Comm'r of Commerce, June 18, 2003.

[371] *Id*.

[372] *Id*.

[373] *Id*.

[374] *Id*. (an administrative equivalent to a motion for summary judgment).

[375] *Id*.

[376] *Id*. *See* text at n. 78-80 (*citing* Employment Division v. Smith, 494 U.S. 872, 878-879 (1990)). Administrative Law Judge Beck reasoned, "[t]he Cookes and the Respondents also assert that they fall within an exception recognized in *Smith* for "hybrid" cases where more than one constitutional right is involved. Even after *Smith*, a hybrid rights case will receive strict scrutiny under the free exercise clause. … Since the solicitation of contributions is protected free speech, it appears that this case involves more than one constitutional right and would not be decided under the analysis applied in *Smith*. The hybrid analysis is similar to the analysis employed under the Minnesota Constitution." *Id.*

[377] *In re* Barberton Rescue Mission, Inc*.,* No. 1-1004-14523-2, State of Minn. Office of Admin. Hearings for the Comm'r of Commerce, June 18, 2003.

[378] *Id*.; *see supra* text accompanying note 85.

burden the exercise of their beliefs."[379] The record demonstrated CBN's health care sharing ministry "is a vehicle for the expression of Christian faith by those who subscribe."[380] Judge Beck noted, "[s]ome subscribers, such as the Cookes, contribute monthly but make no medical expense claims. They do not use the newsletter as insurance, but as a means of giving to others in need."[381] Other CBN subscribers submitted affidavits stating that, "subscription to the newsletter is a voluntary expression of Christian faith that allows subscribers to practice their sincere belief that the Bible requires them to share one another's burdens. They describe participation in the newsletter as an act of worship."[382] Mr. Cooke stated "the newsletter allows him to fulfill his obligation to God to contribute to the medical needs of other Christians."[383] Judge Beck observed, "[t]he fact that subscribers are willing to make monthly payments to CBN with a clear understanding that they are promised nothing in return, indicates that there is a strong non-economic factor involved."[384] Judge Beck also opined, "the free exercise of religion includes the right to select the form of worship, at least where the state interest in regulation is not strongly compelling."[385]

On the third and fourth factors, the Department of Commerce did not establish that regulating CBN as an insurance company was an overriding or compelling state interest, nor did it demonstrate that "regulation as an insurance company is the least restrictive alternative."[386] The Cookes argued the Department had shown no compelling or overriding interest in light of the fact that the consumers apparently needing the Department's protection sought an exemption from those regulations.[387] The affidavits of subscribers indicated they believed regulation unnecessary.[388] The Cookes argued the Department could achieve its interest through less restrictive means, namely requiring CBN to use explicit warnings and disclaimers in its correspondence.[389] Judge Beck observed, "it appears that the explicit disclaimers used by CBN have avoided complaints in the past, and presumably should do so in the future."[390] In balancing these factors, Judge Beck concluded, "the infringement on the sincere religious beliefs of CBN and its subscribers outweighs the Department's interest in regulation."[391]

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[379] *In re* Barberton Rescue Mission, Inc., No. 1-1004-14523-2, State of Minn. Office of Admin. Hearings for the Comm'r of Commerce, June 18, 2003.

[380] *Id*.

[381] *Id*.

[382] *Id*.

[383] *Id*.

[384] *Id*.

[385] *Id*.

[386] *Id*.

[387] *Id*.

[388] *Id*.

[389] *Id*.

[390] *Id*.

[391] *Id*.

In conclusion, HCSMs are much more than a "purportedly biblically based ministerial service"[392] or an unregulated insurance substitute "operating under the guise of religion."[393] Though HCSMs involve charity, HCSMs are more than a charitable endeavor and they involve more than just simple altruism.[394] HCSMs are religious ministries, and members of HCSMs have the constitutional right to the free exercise of their religious faith. This right goes far beyond mere charity or simple altruism. This fundamental freedom requires that the courts and state insurance regulators respect this individual right to share the medical financial burdens of others according to one's own conscience and religious convictions.

C. The Separation of Powers

A third reason why state courts should not view HCSMs as insurance lies in the doctrine of the separation of powers. Simply, if state legislatures intended to include HCSMs within the definition of insurance, the legislatures could do so without the help of the judicial branch extending insurance laws to envelop HCSMs. The California Supreme Court believed "a sound jurisprudence does not suggest the extension, by judicial construction, of the insurance laws to govern every contract involving an assumption of risk or indemnification of loss …."[395] In a case involving a railroad's voluntary relief fund, the New York Court of Appeals stated, "[t]he defendant's relief department has been in existence more than 25 years, and if the Legislature had intended to include such a department within the provisions of section 201 of the Insurance Law, it would have used language therein to show such intention."[396] Likewise, in regard to HCSMs, it is a temptation for courts to extend insurance laws and envelop HCSMs at the behest of administrative officers. A sound jurisprudence, however, does require or even suggest this extension. If the various state legislatures intended to include HCSMs within the definition of insurance, those legislatures would have used language to show that intention. This they have not done.

The Kansas Supreme Court stated, regarding whether a certain cemetery corporation was in the insurance business: "[i]f the legislature had considered pre-need contracts to furnish such property as being within the realm of state insurance regulation there would have been little occasion for the enactment of K.S.A. 16-301."[397] Further, "this may be considered some indication of legislative intent as to what is embraced within the insurance code. The entire subject is within legislative

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[392] Commonwealth v. Reinhold, No. 2007-CA-000661-MR, 2008 WL 4530900 (Ky. Ct. App. Oct. 10, 2008) (Nickell, J., concurring in result only), *rev'd*, 325 S.W.3d 272 (Ky. 2010).

[393] *Id*. (Thompson, J., dissenting).

[394] Commonwealth v. Reinhold, 325 S.W.3d 272, 278 (Ky. 2010) ("[W]e do not doubt the claim that Medi–Share members are altruistically inspired . . . ." The majority also believed the facts before them did not support the contention that Medi-Share members were "actually undertaking a charitable endeavor and not attempting to shift the risk.").

[395] Transportation Guarantee Co. v. Jellins, 174 P.2d 625, 629 (Ca. 1946) ("[T]hat when the question arises each contract must be tested by its own terms as they are written, as they are understood by the parties, and as they are applied under the particular circumstances involved.")

[396] Colaizzi v. Pa. R.R. Co., 101 N.E. 859, 863 (N.Y. Ct. App. 1913).

[397] Londerholm v. Anderson, 408 P.2d 864, 876 (Kan. 1966).

compass and further supervision should be left to legislative direction."[398] Regarding a consumer cooperative, the Circuit Court of Appeals for the District of Columbia stated:

> [E]xperience to date with consumer cooperatives, organized and limited in their activities, management and membership as in Group Health, has not shown that they are susceptible to the abuses feared. If they or others should appear, measures for their control should be enacted by [sic] the legislature, not prescribed through judicial expansion of existing statutes designed for other organizations' activities and abuses.[399]

Similarly, if state legislatures considered HCSM "commitment contracts" to fall in the realm of insurance, there would be little need for those state legislatures to enact "safe harbor" statutes that define HCSMs. This fact should be considered at least *some* indication of legislative intent. The subject of whether HCSMs are "insurance" is within the legislative compass and further supervision should be left to the state legislatures, not the judiciary or administrative officers. Likewise, experience to date with HCSMs, organized and limited in their activities, management, and membership, has not shown that they are susceptible to the abuses certain state insurance commissioners fear.[400] If such abuses should appear, state legislatures may enact other HCSM-specific measures to regulate such abuses. The judiciary should not expand existing insurance statutes that are "designed for other organizations' activities and abuses."[401]

D. Implications of HCSMs' Status as Charitable Organizations

HCSMs are 501(c)(3) tax-exempt charitable and religious organizations, and as non-profit religious organizations HCSMs are under the regulatory oversight of the state attorneys general.[402] "In the common law,[403] under the provisions of the

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[398] *Id*.

[399] Jordan v. Group Health Ass'n, 107 F.2d 239, 253 (D.C. Cir. 1939).

[400] *See*, *e.g., supra* Part 4.C.1.

[401] *Jordan*, 107 F.2d at 253.

[402] Mary Blasko, Curt Crossley & David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 40-41 (1993).

[403] *Id*. ("The various American states almost unanimously adopted this principle, reasoning that 'the state, as *parens patriae*, superintends the management of all public charities or trusts, and in these matters acts through her attorney general.'"). Blasko was quoting the California Supreme Court, which opined at length:

> [t]he state, as parens patriae, superintends the management of all public charities or trusts, and in these matters acts through her attorney general. Generally speaking, such an action will not be entertained at all unless the attorney general is a party to it. Such was the rule at common law, and it has not been changed in this state. Even in those states, such as Massachusetts, where by special statute the attorney general is instructed to prosecute such actions, it is declared that the statute does not narrow or diminish in this regard the common law powers incident to the office.

Ellert v. Cogswell, 45 P. 270, 271 (Cal. 1896) (citation omitted).

Revised Model Nonprofit Corporation Act,[404] and in the statutes of all jurisdictions,[405] the Attorney General has standing to supervise charities and enforce their legal responsibilities."[406] "The attorneys general represent the public interest in court in enforcing the fiduciary obligations charitable organizations undertake to the public."[407] However, if judges or state insurance departments forget the authority of the state attorneys general, they might assume that HCSMs would remain completely unregulated if not subject to state insurance regulations. This assumption presents a false dilemma, also known as the 'logical fallacy of bifurcation,' where "someone is asked to choose between two options when there is at least one other option available."[408] Thus, Judge Nickell of the Kentucky Court of Appeals wrote of "Medi-Share's unabashed attempt to avoid regulatory oversight and review demanded of health insurers . . ."[409]

HCSMs are not attempting to avoid oversight. In fact, HCSMs cannot avoid the supervisorial and enforcement oversight of the respective state attorneys general. The specific structure of HCSMs and the "safe harbor" statutes keep HCSMs from the specific regulatory oversight the states demand of health insurers. Thus, this false dilemma bifurcates between the choices of either 1) regulatory oversight by state insurance departments; or 2) absolutely no oversight at all. Interestingly, the available option of attorneys general enforcement evidently did not surface on Kentucky's radar in the *Reinhold* lawsuit. This is not surprising, for the Kentucky Attorney General's Office had investigated no complaints at all regarding Medi-Share[410] and would thus have no standing to bring a lawsuit against the Christian Care Ministry and its Medi-Share program.

Attorney general supervision of HCSMs does work and destroys the "either/or" of the false dilemma. The Ohio Attorney General filed suit against the Christian Brotherhood Newsletter in 2001 and this suit is an example of a state's attorney general's oversight over an HCSM.[411] This Ohio lawsuit charged the founder of CBN with fraud and conversion, and demanded the return of property and cash

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[404] Rev. Model Nonprofit Corp. Act §1.70 (1987).

[405] *See* Blasko, et al., *supra* note 402, at 45–47 (surveying state statutes that outline the authority of the state attorney generals).

[406] RELIGIOUS ORGANIZATIONS AND THE LAW § 10:19 (West 2012).

[407] *Id*.

[408] *See, e.g., False Dilemma*, LOGICAL FALLACIES.ORG, http://www.logicalfallacies.info/presumption/false-dilemma/ (last visited Oct. 25, 2012).

[409] Commonwealth v. Reinhold, No. 2007-CA-000661-MR, 2008 WL 4530900 (Ky. Ct. App. Oct. 10, 2008) (Nickell, J., concurring in result only), *rev'd*, 325 S.W.3d 272 (Ky. 2010).

[410] Roger Alford, *Kentucky Churchgoers: Medi-Share Not an Insurance Program,* INSURANCE JOURNAL, October 30, 2006, http://www.insurancejournal.com/news/southeast/2006/10/30/73618.htm (last visited June 22, 2012) (Vicki Glass, spokeswoman for the Kentucky Attorney General's Office, said her office has investigated no complaints.).

[411] Chuck Fager, *Lawsuit: Health Plan Accused*, CHRISTIANITY TODAY ONLINE (April 2, 2001), http://www.christianitytoday.com/ct/2001/april2/8.23.html (last visited July 13, 2012). ("The Christian Brotherhood Newsletter had to repay nearly $15 million that previous management spent on homes, motorcycles and luxury cars. The company was placed in receivership in 2001, and the management was removed.").

worth over $2.4 million dollars.[412] After the lawsuit, CBN continued to operate under new leadership with established safeguards to prevent such problems.[413] Thus, through the common law and state statute, state attorneys general have a check on HCSMs. The state attorneys general have the legal ability to intervene if HCSMs are abusing their authority and not using assets for their proper charitable purposes.

In conclusion, the status of HCSMs as nonprofit religious organizations brings HCSMs under the supervisorial and enforcement authority of the state attorneys general. State courts and insurance regulators should not assume that HCSMs need additional regulatory oversight and review by subjecting these ministries to state insurance regulations.

E. Federal Preemption Under PPACA

Finally, state legislators, regulators and courts should be aware that the congressional action granting HCSM members a religious exemption from PPACA's individual mandate likely preempts the state regulation of HCSMs as insurance.[414] The McCarran-Ferguson Act provides, "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."[415] McCarran-Ferguson then limits state regulation of insurance so: "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ."[416] The U.S. Supreme Court has employed a three-part test to determine whether the McCarran-Ferguson Act exempts state law from preemption by a federal statute.[417] The test is: "(1) whether the federal statute specifically relates to the business of insurance; (2) whether the state law at issue was enacted for the purpose of regulating the business of insurance; and (3) whether the application of the federal law invalidates, supersedes or impairs the state law."[418]

First, PPACA specifically relates to the business of insurance. From there, at least four scenarios are possible when applying McCarran-Ferguson's test to PPACA's HCSM exemption. The first scenario occurred in Kentucky, where Kentucky's Supreme Court defined Medi-Share as "insurance" under Kentucky's insurance code.[419] Thus, Kentucky meets the second element of the McCarran-

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[412] *Id*.; Sarah Skidmore, *Sharing the Burden: Regulation-free Religious Groups Offer Cost-Sharing Alternatives to Traditional Health Insurance by Banning Risky, High-Cost Behavior*, SAN DIEGO UNION-TRIBUNE, January 8, 2006, http://www.utsandiego.com/uniontrib/20060108/news_lz1b8burden.html (last visited July 13, 2012).

[413] *Id*.

[414] 26 U.S.C.A. § 5000A(d)(2)(B) (West 2012) (the Patient Protection and Affordable Care Act). The author is indebted to Mr. Keith Hopkinson for his assistance on this section.

[415] 15 U.S.C.A. § 1012 (a) (West 2012).

[416] 15 U.S.C.A. § 1012 (b).

[417] United States Dep't. of Treasury v. Fabe, 508 U.S. 491 (1993).

[418] Nat'l Home Ins. Co. v. King, 291 F. Supp. 2d 518, 528 (E.D. Ky. 2003), (*citing* United States Dep't. of Treasury v. Fabe, 508 U.S. 491 (1993)).

[419] Commonwealth v. Reinhold, 325 S.W.3d 272, 277-278 (Ky. 2010).

Ferguson test, where state laws that define "insurance" regulate the business of insurance. The key question in this scenario is whether the application of PPACA's "religious exemption" for HCSMs invalidates, supersedes or impairs the state law, the third element. PPACA's religious exemption for HCSM members features a broad, inclusive definition of HCSMs. The text of PPACA defines the term "health care sharing ministry" as an organization:

> (I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),
> (II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,
> (III) members of which retain membership even after they develop a medical condition,
> (IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and
> (V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.[420]

The application of the HCSM "religious exemption" from PPACA's individual mandate will impair Kentucky's state law. Under Kentucky's statutory definition of insurance, the *Reinhold* court found Medi-Share was insurance. However, under PPACA's religious exemption, Medi-Share would meet all the broad elements above, and would not be insurance, thus impairing Kentucky's definition of insurance. In this scenario, PPACA would preempt Kentucky's statute, as applied in *Reinhold*, and allow Medi-Share to operate in Kentucky.

The second scenario could play out through the HCSM "safe harbor" laws. Under the second element of the McCarran-Ferguson test, many of these state statutes arguably were enacted "for the purpose of regulating the business of insurance."[421] That is, these "safe harbor" laws define HCSMs and shelter these ministries from the provisions of state insurance codes, thus "regulating the business of insurance." Perhaps more appropriately, these statutes regulate what is and what is not the business of insurance. Given this assumption, a problem arises. Many of the state HCSM "safe harbor" laws are much more specific than PPACA's definition of an HCSM.[422] For example, Kentucky's "Religious Publication" statute that specifically requires HCSMs to pay "for the subscribers' financial or medical needs by payments directly from one (1) subscriber to another."[423] PPACA's "religious exemption" merely requires each HCSM to "share medical expenses among

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[420] 26 U.S.C.A. § 5000A(d)(2)(B)(ii)(I-V) (West 2012).

[421] *King*, 291 F. Supp. 2d at 528.

[422] *See, e.g., infra* Appendix B; VA. CODE ANN. § 38.2-6300; VA. CODE ANN. § 38.2-6301.

[423] KY. REV. ST. ANN. § 304.1–120(7)(d) (West 2012).

members in accordance with those beliefs"[424] without regard to whether the sharing of expenses occurs directly from member to member, or indirectly, through escrow-type accounts. In sum, the application of PPACA's "religious exemption" would invalidate, supersede or impair the state law in Kentucky's "Religious Publication" exemption used to define HCSMs.[425] With this scenario, PPACA's religious exemption would preempt all narrower state law definitions of HCSMs and allow HCSMs to operate in such states.

The third scenario might play out as follows. Under the second element of the McCarran-Ferguson test, the state "safe harbor" laws that define HCSMs and shelter these ministries from insurance regulations *do not* operate to regulate the business of insurance.[426] Rather, these state "safe harbor" laws operate to regulate and define HCSMs, which are not insurance. Thus, as state "safe harbor" laws do not regulate the business of insurance, the principles of the McCarran-Ferguson Act would exempt such state "safe harbor" laws from preemption by PPACA's "religious exemption" for HCSMs.

The final scenario could operate as such. Congress has spoken on the issue of HCSMs through PPACA, and PPACA's "religious exemption" has decreed in essence that HCSM membership is an acceptable alternative to PPACA's requirement to "maintain minimum essential [insurance] coverage."[427] The application of PPACA's religious exemption for HCSM membership would impair narrower state laws enacted to regulate the business of insurance by defining what HCSMs are.[428] This fourth scenario would thus meet the three elements of the McCarran Ferguson test.

With the fourth scenario, the Liability Risk Retention Act (LRRA) and its well-known preemption of state-level insurance regulation are persuasive on what regulatory authority the states would possess over HCSMs in the wake of PPACA.[429] The LRRA exempts risk retention groups from "any State law, rule, regulation, or order to the extent that such . . . would . . . make unlawful, or regulate, directly or indirectly, the operation of a risk retention group."[430] Analogously, PPACA would exempt HCSMs from any state law, rule, regulation or order to the extent the state's action would make the operation of HCSMs unlawful. Under LRRA's persuasive precedent, the states under PPACA could at the most require similar registration, financial examination, and reporting requirements that the LRRA requires of risk retention groups.[431]

In conclusion, there are many, many unknowns regarding PPACA's effect on HCSMs and HCSM members via the federal regulations that will implement

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[424] 26 U.S.C.A. § 5000A(d)(2)(B)(ii)(II) (West 2012).

[425] Nat'l Home Ins. Co. v. King, 291 F. Supp. 2d 518, 528 (E.D. Ky. 2003).

[426] *Id.*

[427] 26 U.S.C.A. § 5000A(a) (West 2012).

[428] *King*, 291 F. Supp. at 528 (*citing* United States Dep't. of Treasury v. Fabe, 508 U.S. 491 (1993)).

[429] 15 U.S.C. § 3902(a) (West 2012).

[430] *Id*. at (a)(1).

[431] *Id*. at (a)(1)(A)-(I).

PPACA. Whatever the future holds for HCSMs under PPACA's regulatory regime, PPACA most likely will preempt the state regulation of HCSMs under the legal standards of the McCarran-Ferguson Act and the LRRA's analogous legal principles.

VIII. Conclusion: The *Reinhold* Epilogue

After the remand of the *Reinhold* case, the Kentucky Department of Insurance moved the Franklin County Circuit Court for a permanent injunction barring Medi-Share from operating in Kentucky outside the scope of a specific exemption.[432] In March 2011, Medi-Share agreed to an order for a permanent injunction prohibiting their operations in Kentucky.[433] Despite Medi-Share's objections, the order stipulated Medi-Share is insurance and not exempt from the insurance code, and barred Medi-Share from transacting insurance in Kentucky, unless it obtained a certificate of authority or license, or qualified for an exemption.[434]

Medi-Share sought to qualify for the exemption. Medi-Share's representatives met with the Department to discuss potential changes to the program.[435] Medi-Share hoped the changes would bring the HCSM within the scope of the exemption.[436] The Department issued a letter in April 2011 reiterating that Medi-Share did not qualify for the exemption because Medi-Share did not feature direct payments between subscribers, a promise to pay exists between the subscribers and Medi-Share, and the monthly amounts due are specified by Medi-Share.[437] Medi-Share requested an administrative hearing to determine whether Medi-Share qualified for the exemption; the Department denied Medi-Share's request and simultaneously filed a Motion for Contempt.[438] The Department asserted Medi-Share continued to operate in violation of the permanent injunction.[439]

Medi-Share responded by maintaining it modified its plan, thus complying with K.R.S. § 304.1-120(7) and the Supreme Court's ruling.[440] The Franklin Circuit Court held a hearing in August 2012.[441] First, the Circuit Court did not find Medi-Share in contempt.[442] The court was unwilling to find Med-Share operated in violation of the injunction willfully, knowingly or disrespectfully, as Medi-Share in good faith

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[432] Commonwealth v. Reinhold, C.A. Nos. 02-CI-00837 and 11-CI-1292, at 2 (Ky. Cir. Ct. Oct. 2, 2012) (unpublished opinion and order) (on file with author).

[433] *Id*. at 1-2 (*citing* the "Agreed Order and Judgment of Permanent Injunction Prohibiting Operation of MediShare in the Commonwealth of Kentucky" that parties entered into).

[434] *Id*. at 3.

[435] *Id*. at 3.

[436] *Id*.

[437] *Id*. (*citing* KY. REV. ST. ANN. §304.1-120(7)(d)-(e)).

[438] *Id*. at 3-4.

[439] *Id.*

[440] *Id*. at 4.

[441] *Id*.

[442] *Id*. at 8.

believed it complied with the exemption.[443] Second, the court held that Medi-Share, "even after modifications, remains noncompliant with the provisions of the exemption as explicated by the Supreme Court in *Reinhold*."[444]

The Circuit Court found that Medi-Share "still serves as an intermediary through which monthly shares from subscribers are collected and held, pending use for paying other subscribers' medical needs."[445] Medi-Share provided testimony of changes to its operations.[446] Medi-Share's members no longer submit payments to a trust account.[447] Rather, Medi-Share's members transfer funds directly from their own account to another member's account.[448] Members set up a designated credit union account, deposit money on a monthly basis, and grant Medi-Share a limited power of attorney to transfer money to cover costs and benefit other members.[449] The Circuit Court concluded Medi-Share "still fails to comply with the Supreme Court's decision because 'Medi-Share [still] determines which needs are paid, how they are paid, and when they are paid.'"[450] The Circuit Court then ordered Medi-Share to cease all operations in Kentucky unless it receives a certificate of authority or license from the Department of Insurance.[451]

However, Medi-Share's story in Kentucky is not over. First, the Christian Care Ministry filed a Motion to Alter, Amend, or Vacate the Franklin Circuit Court ruling regarding the Medi-Share program,[452] which the court heard on October 24, 2012.[453]

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[443] *Id.*

[444] *Id*. at 11.

[445] *Id*.

[446] *Id*. at 10.

[447] *Id*.

[448] *Id*. Stephen Sullivan, General Counsel for Christian Care Ministries, Inc., also explained:

> Medi-Share's sharing process has substantially changed since the record in the *Reinhold* case was created. The use of the trust and member sub-accounts has been eliminated. Today, members deposit their sharing funds directly into their own personal checking account for sharing with other members. If funds are needed to pay a medical bill, the funds are transferred directly between members' individual checking accounts, with the check to the provider being issued from the checking account of the member with the bill. Members never send their sharing funds to Medi-Share, and Medi-Share never receives their sharing funds.

Email from Stephen Sullivan, General Counsel for Christian Care Ministries, Inc., to Benjamin Boyd (Sept. 10, 2012 12:32 MT) (on file with author).

[449] Commonwealth v. Reinhold, C.A. Nos. 02-CI-00837 and 11-CI-1292, at 11 (Ky. Cir. Ct. Oct. 2, 2012) (unpublished opinion and order) (on file with author).

[450] *Id*. (*citing* Commonwealth v. Reinhold, 325 S.W.3d 272, 279 (Ky. 2010)).

[451] *Id*. at 12.

[452] Email from Stephen Sullivan, General Counsel for Christian Care Ministries, Inc., to Benjamin Boyd (Oct. 19, 2012 5:22 MT) (on file with the author).

[453] Email from Stephen Sullivan, General Counsel for Christian Care Ministries, Inc., to Benjamin Boyd (Oct. 23, 2012 11:38 MT) (on file with the author).

The Christian Care Ministry argued that the court's decision was not ripe, the court misapplied the Kentucky Supreme Court's standard from *Commonwealth v. Reinhold*, and the court failed to acknowledge well-settled principles of agency law that the actions of an attorney in fact under a power of attorney are the actions of the principal.[454]

Second, on September 19, 2012, Kentucky Senator Tom Buford sponsored and pre-filed an amendment to K.R.S. § 304.1-120.[455] Among other things, the proposed amendment seeks to delete the requirement of direct payment from one member to another and delete the requirement that the HCSM state that member gift amounts are voluntary with no assumption of risk or promise to pay.[456] If amended, Medi-Share presumably would comply with K.R.S. § 304.1-120, "as explicated by the Supreme Court in *Reinhold*."[457] The deletion of the direct sharing requirement and the requirement to "suggest[] amounts to give that are voluntary"[458] would permit Medi-Share to act as an "intermediary" and "determine[] which needs are paid, how they are paid, and when they are paid."[459] Senator Buford's proposed amendment would thus remove the legal support for the second part of the *Reinhold* decision and also render moot the Franklin County Circuit Court's recent *Opinion and Order* applying that decision.

IX. Conclusion: Observations and Analysis

In conclusion, Health Care Sharing Ministries are not some kind of scam or "part of the problem[s]" with America's health care system.[460] HCSMs are "part of the solution"[461] for America's health care needs and this for several reasons. First, HCSM membership exempts members from the individual mandate in the PPACA; second, HCSMs are affordable for most qualifying individuals and families; and lastly, HCSMs demonstrate the faith, values, caring, and ideals "all too often lacking in many health insurance options available today."[462]

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[454] *Id*.

[455] S.B. 3, 2013 Reg. Sess. (Ky.2013), *available at* http://www.lrc.ky.gov/record/13RS/SB3.htm (last visited October 19, 2012).

[456] *Id*.

[457] Commonwealth v. Reinhold, C.A. Nos. 02-CI-00837 and 11-CI-1292, at 11 (Ky. Cir. Ct. Oct. 2, 2012) (unpublished opinion and order) (on file with author).

[458] S.B. 3, 2013 Reg. Sess. (Ky.2013), *available at* http://www.lrc.ky.gov/record/13RS/SB3.htm (last visited October 19, 2012).

[459] Commonwealth v. Reinhold, 325 S.W.3d 272, 279 (Ky. 2010).

[460] JoNel Aleccia, *Christian Co-ops Swap Burden of Medical Bills*, MSNBC.COM, April 14, 2010, http://www.msnbc.msn.com/id/36473470/ns/health-health_care/t/christian-co-ops-swap-burden-medical-bills/#.UAGr2JHvhBk (last visited July 14, 2012).

[461] *Id*. (*quoting* James K. Lansberry, Vice President of Samaritan Ministries International).

[462] Twila Brase, *MEDICAL SHARING: An Inexpensive Alternative to Health Insurance* , CITIZENS' COUNCIL ON HEALTH CARE, at 7 (January 2010), http://www.cchfreedom.org/pr/MEDICAL_SHARING-FINAL_JAN2010.pdf (last visited May 30, 2012).

First, as noted above, the PPACA grants a religious exemption for HCSM members from the mandate to purchase insurance.[463] HCSM members are exempt from the individual mandate precisely because HCSM members are paying their bills and sharing other members' medical expenses.[464] HCSMs are an established feature in the American health care landscape with a healthy thirty-year track record. HCSMs and their "members are here, they're paying their bills."[465] This religious exemption from PPACA's individual mandate, coupled with HCSMs' low rates when compared to health insurance, has contributed to increased interest in HCSM membership with Samaritan Ministries.[466] Tony Meggs, Medi-Share's President and CEO, reported "Medi-Share's steady growth 'accelerated' after the [PP]ACA was enacted," and he expected "that growth to continue because . . . there is about a 40 percent cost difference between an individual health insurance plan and a monthly Medi-Share contribution."[467]

Second, HCSMs offer a cost-effective method to pay for the rising costs of health care, when compared to health insurance policies.[468] In 2010, the Citizens' Council on Health Care prepared a chart comparing HCSM memberships to health insurance policies, figured for a family of four.[469] First, the costs for a health insurance plan with a $5,000 deductible ranged between $300 and $400 per month, depending upon location, while the costs for a HCSM membership ranged from $240 to $400.[470] Second, HCSM members typically pay for the first $250 to $500 of any qualifying medical expenses per month; the rest is "published" or shared through the ministry.[471] In addition, HCSM members needs potentially may be fully "published" or shared.[472] In contrast, a $5,000 deductible health insurance policy requires the

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[463] Patient Protection and Affordable Care Act, 26 U.S.C.A. § 5000A (West 2012).

[464] *See, e.g.,* Steve Twedt, *Health Care Overhaul Law Exempts Sharing Ministries*, PITTSBURGH POST-GAZETTE, July 3, 2012, *available at* http://www.post-gazette.com/stories/news/health/health-care-overhaul-law-exempts-sharing-ministries-269561/?p=0.

[465] *See* Aleccia, *supra* note 460 ("It's the same argument used by other recognized religious groups, including the Amish, whose members long have been able to be exempted from paying taxes for Social Security and Medicare."); *see* Brase, *supra* note 1, at 7.

[466] PRWeb, *Interest in Samaritan Ministries Increases Following SCOTUS Decision on Health Care Law*, PR WEB (July 5, 2012), http://www.prweb.com/releases/samaritanministries/07/prweb9668682.htm.

[467] Christine A. Scheller, *'Obamacare' Prevails: Supreme Court Upholds Healthcare Law*, URBAN FAITH (June 28, 2012), http://www.urbanfaith.com/2012/06/obamacare-prevails-supreme-court-upholds-healthcare-law.html/.

[468] Brase, *supra* note 1, at 2.

[469] Brase, *supra* note 1, at 2 (Brase obtained data from e-mail interviews with the directors of all three HCSMs and obtained health insurance data from online quotes.).

[470] Brase, *supra* note 1, at 2.

[471] Brase, *supra* note 1, at 2. (indicating member's shares are set at $300); *but see Medical Sharing Ministries (MSM) - Comparison Chart*, CITIZENS' COUNCIL FOR HEALTH FREEDOM, http://www.cchfreedom.org/word/MSM(1).pdf (last updated Apr. 1 2010) (reporting on the share of each medical "episode" before the ministry begins paying varies from ministry to ministry, according to participation levels).

[472] Brase*, supra* note 1, at 2.

insured to pay up to 30% of the total bill for large expenses.[473] Third, HCSM applicants are generally "never refused membership based upon previous medical conditions," while insurance applicants "may be refused coverage due to prior conditions such as cancer, tobacco use, etc."[474] Fourth, HCSM members "may use any doctor or hospital without restriction," while some insurance "plans specify which doctors may be used. Access to specialist care may be restricted."[475]

In addition, the Christian Healthcare Ministry (CHM) provided a cost comparison between its "Gold Level" participation and average 2010 prices for Health Maintenance Organization (HMO) plans, Preferred Provider Organization (PPO) plans, and Point of Service (POS) plans.[476] The HMO, PPO, and POS family plans all cost over $1,100 per month, while CHM's "Gold Level" plan costs $450. The HMO, PPO, and POS individual plans cost between $427 and $437, while CHM's "Gold Level" individual plan costs $150.[477] Thus, just from the savings alone, both through lower monthly "shares" as contrasted to premiums and much lower "deductibles," HCSMs represent a financially sustainable means for ensuring the payment of the high costs of health care in the United States.

Third, HCSMs are not merely an affordable substitute for insurance; HCSMs present a completely different option – and thus, the states should not seek to regulate HCSMs as if they were insurance. HCSMs "demonstrate the patient-centered values, religious principles, free market ideals, charity, community focus, and compassion for fellow human beings that is all too often lacking in many health insurance options available today."[478] According to Mr. James Lansberry, Samaritan Ministries' Vice President, HCSMs are a unique and viable alternative to health insurance companies because of the "community approach to healthcare . . . ."[479] Lansberry continued, "[t]hat makes this better than anything else out there . . . . We are trying to re-personalize healthcare, or put the care back into healthcare."[480] Indeed, the community focus of HCSMs hearkens back to centuries-old Amish practices,[481] who believe "it is their religious duty to help those in need, particularly

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[473] Brase, *supra* note 1, at 2.

[474] Brase, *supra* note 1, at 2.

[475] Brase, *supra* note 1, at 2.

[476] The Christian Healthcare Ministry, *Counting the Cost*, CHRISTIAN HEALTHCARE MINISTRY, http://www.chministries.org/countingthecost.aspx (last visited July 23, 2012).

[477] *Id*.

[478] Brase, *supra* note 1, at 7.

[479] Brase, *supra* note 1, at 2 (*quoting* personal e-mail, Jan. 5, 2009).

[480] Brase, *supra* note 1, at 2.

[481] *See Alliance of Health Care Sharing Ministries: History*, ALLIANCE OF HEALTH CARE SHARING MINISTRIES, http://www.healthcaresharing.org/hcsm (last visited July 20, 2012) (comparing HCSMs to the Old Order Amish "Church Funds." "HCSMs have grown in popularity and success ever since the Old Order Amish Church Fund began the modern-era of burden-bearing during the 1960's. Today, participants from a broad spectrum of Christian denominations support each other's medical needs across all fifty states and around the world.").

those from their own community."[482] The Amish call this "Mutual Aid," and the Amish fulfill this duty in several ways, one being by sharing the high costs of hospital bills, somewhat like a localized HCSM.[483] Interestingly, Amish Mutual Aid went unchallenged for generations until the advent of Social Security.[484] The Amish refused to pay the federal taxes for Social Security, believing Social Security was an insurance policy that violated their religious beliefs.[485] The Amish eventually won an exemption from Social Security.[486] The Amish and other similar religious groups also have a "religious conscience exemption" from PPACA's "individual mandate."[487] Much like the Amish resistance to Social Security, HCSMs continue to work, state by state, for these "safe harbor" provisions from insurance regulations.[488] HCSMs have also secured a religious exemption from PPACA's individual mandate, and rightly so, for in a powerful and compelling way, these religious health care sharing ministries return many back to the concept of "bearing one another's burdens," where "mutual aid" was the "foundation of social welfare in the United States."[489]

In conclusion, state legislatures should enact "safe harbor" provisions for HCSMs – and defer to federal regulation of HCSMs under PPACA, because some state insurance departments likely will continue to challenge HCSMs.[490] Yet, why do state insurance departments seek to conform HCSMs to the image of insurance? Why, as one judge noted with a touch of irony, do "the consumers apparently needing the Department's protection seek an exemption from those regulations"?[491] Perhaps one reason some state insurance officials view HCSMs with suspicion lies with the fact "our mentality has moved far from that of our ancestors."[492] Indeed,

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[482] Jennifer Girod, *A Sustainable Medicine: Lessons from the Old Order Amish*, 23 J. MED. HUMAN. 31, 33 (2002).

[483] *Id*. The author's father, a family physician, once practiced medicine in and around Pennsylvania's Amish country, and recalls hearing stories of the Amish paying large medical bills with *briefcases* of cash.

[484] *Id*.

[485] *Id*.

[486] *Id*.

[487] 26 U.S.C.A. § 5000A(d)(2)(A) (West 2012).

[488] Alliance of Health Care Sharing Ministries, *Current State Issues*, ALLIANCE OF HEALTH CARE SHARING MINISTRIES, http://www.healthcaresharing.org/issues/index.php?State=None (last visited July 20, 2012).

[489] *See supra* text accompanying note 481.

[490] Diana B. Henriques, *Ministry's Medical Program Is Not Regulated,* THE N.Y. TIMES, October 20, 2006, *available at* http://www.nytimes.com/2006/10/20/business/20religion .html?_r=2&pagewanted=all (Henriques quotes E. John Reinhold, chairman of Medi-Share, who stated: "We went through this eight years ago," he said. "Then, you have a regime change and another set of bushy-tails comes into command and it starts up all over again," regarding Kentucky's challenge to Medi-Share.).

[491] *In re* Barberton Rescue Mission, Inc. No. 1-1004-14523-2, State of Minn. Office of Admin. Hearings for the Comm'r of Commerce, June 18, 2003.

[492] *See supra* text accompanying note 481.

the Alliance of Health Care Sharing Ministries notes, "we hardly know what . . . the mandate to bear one another's burdens . . . . means anymore."[493] Thus, for many of us, "[i]f an emergency medical problem arises, the government or the insurance company takes care of it, and our friends, relatives and neighbors have little participation in restoring us to our former state."[494] In the words of Indiana Insurance Commissioner James Atterholt, "all regulators [should] respect citizens' rights to freely pursue their own solutions for their medical expenses, and recognize HCSMs for what they are: charitable organizations serving individuals who voluntarily support one another in their time of need."[495] In sum, HCSMs should be protected and not put off as insurance scams. HCSMs should be helped, not hindered, as the many thousands of HCSM members seek to "[b]ear one another's burdens, and thus fulfill the law of Christ."[496]

APPENDIX A: STATE AND FEDERAL CASE LAW LISTING THE ASSUMPTION OF THE RISK AS AN ELEMENT OF INSURANCE

1. Alabama: "Insurance exists when a contractual relationship between the insurer and the insured shifts the risk of loss from the insured to the insurer." Warehouse Home Furnishing Distribs., Inc. v. Whitson, 709 So. 2d 1144, 1152 (Ala. 1997) (citation omitted).
2. Arizona: "Five elements are normally present in an insurance contract, which include: 1. An insurable interest; 2. A risk of loss; 3. An assumption of the risk by the insurer; 4. A general scheme to distribute the loss among the larger group of persons bearing similar risks; 5. The payment of a premium for the assumption of risk." Guaranteed Warranty Corp., Inc. v. State ex rel. Humphrey, 533 P.2d 87, 90 (Ariz. Ct. App. 1975) (citations omitted).
3. California: "Essential to insurance is the element of shifting of the risk of loss, subject to contingent or future events, by legally binding agreement." Richardson v. GAB Bus. Servs., Inc., 207 Cal. Rptr. 519, 523 (Cal. Ct. App. 1984) (citation omitted).
   "Insurance Code section 22 (section 22) defines insurance as "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." Section 22 has been interpreted as requiring two elements: (1) shifting one party's risk of loss to another party; and (2) distribution of that risk among similarly situated persons." Auto. Funding Grp, Inc. v. Garamendi, 7 Cal. Rptr. 3d 912, 915 (Cal. Ct. App. 2003) (citation omitted).
4. Delaware: "Insurance, in its basic operation, involves the setting aside of money to establish a fund sufficient to respond to claims arising from predictable risks. Whether the funding be through contract with an independent insurer, or self-funding, or a combination of the two through partial self-insurance in the form of deductibles, the result is the same. A

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493 *Id*.

494 *Id*.

495 Letter from James Atterholt to James Lansberry (May 7, 2009) (on file with author).

496 *Galatians* 6:2.

fund is created to protect against risk of bodily harm or property damage." Stop & Shop Cos., Inc. v. Gonzales, 619 A.2d 896, 898 (Del. 1993) (citation omitted).

5. District of Columbia: "The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." Carter v. State Farm Mut. Auto. Ins. Co., 808 A.2d 466, 472 (D.C. 2002) (citations omitted).

   "Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated conceptions of insurance and indemnity require these element. Hazard is essential and equally so a shifting of its incidence. If there is no risk, or there being one it is not shifted to another or others, there can be neither insurance nor indemnity. Insurance also, by the better view, involves distribution of the risk, but distribution without assumption hardly can be held to be insurance. These are elemental conceptions and controlling ones." Jordan v. Group Health Ass'n, 107 F.2d 239, 245 (D.C. Cir. 1939) (finding a group health association not insurance).
6. Florida: "Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated conceptions of insurance and indemnity require these element[s]. Hazard is essential.... If there is no risk, ... there can be [no] insurance." Interstate Fire & Cas. Co. v. Abernathy, 93 So. 3d 352, 359 (Fla. Ct. App. 2012) (citation omitted).
7. Georgia: "Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency." Bankers' Health & Life Ins. Co. v. Knott, 154 S.E. 194, 196 (Ga. Ct. App. 1930) (citation omitted).
8. Idaho: ""Insurance" is a contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies." "…coverage for real and determinable risks … therefore comes within the statutory definition of insurance." Selkirk Seed Co. v. State Ins. Fund, 18 P.3d 956, 961 (Idaho 2000).
9. Illinois: "Thus, it appears that "insurance" can be characterized as involving: (1) a contract or agreement between an insurer and an insured which exists for a specific period of time; (2) an insurable interest (usually property) possessed by the insured; (3) consideration in the form of a premium paid by the insured to the insurer; and (4) the assumption of risk by the insurer whereby the insurer agrees to indemnify the insured for potential pecuniary loss to the insured's property resulting from certain specified perils." Griffin Sys., Inc. v. Washburn, 505 N.E.2d 1121, 1123-24 (Ill. Ct. App. 1987).
10. Indiana: "Generally, insurance is a contract of indemnity through which a party undertakes an obligation to compensate another against loss arising from certain specified contingencies or perils by shifting the risk of loss

from the insured to the insurer." Motorists Mut. Ins. Co. v. Morris, 654 N.E.2d 861, 863 (Ind. Ct. App. 1995) (citation omitted).

11. Iowa: "[T]o be considered insurance, the assumption of risk by the promoter must be the 'principal object and purpose of the program.'" Barberton Rescue Missions, Inc. v. Ins. Div. of the Iowa Dep't of Commerce, 586 N.W.2d 352, 355 (Iowa 1998) (citation omitted).

    > "A contract is one of insurance if it meets the following test: one party, for compensation, assumes the risk of another; the party who assumes the risk agrees to pay a certain sum of money on a specified contingency; and the payment is made to the other party or the party's nominee." Iowa Contractors Workers' Comp. Grp. v. Iowa Ins. Guar. Ass'n, 437 N.W.2d 909, 916 (Iowa 1989) (citation omitted).

12. Kansas: "Whether a company is engaged in the insurance business depends * * * on the character of the business that it transacts * * * and whether the assumption of a risk, or some other matter to which it is related, is the principal object and purpose of the business." State ex rel. Londerholm v. Anderson, 408 P.2d 864, 875 (Kan. 1966) (citation omitted).
13. Kentucky: "An insurance policy is a contract of indemnity whereby the insurer agrees to indemnify the insured for any loss resulting from a specific event. The insurer undertakes the obligation based on an evaluation of the market's wide risks and losses. An insurer expects losses, and they are actuarially predicted. The cost of such losses are spread through the market by means of a premium." Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., 983 S.W.2d 501, 504-505 (Ky. 1998).
14. Louisiana: "The primary characteristic of the business of insurance is the transferring or spreading of risk. So long as this characteristic is present, the business of insurance is not limited to traditionally recognized areas of insurance." Louisiana Safety Ass'n of Timbermen-Self Insurers Fund v. Louisiana Ins. Guar. Ass'n, 17 So.3d 350, 358, n.27 (La. 2009) (internal citation omitted).
15. Maryland: "Thus an insurance contract is one whereby for a stipulated consideration one party undertakes to compensate the other for loss on a specified subject by specified perils." Chicago Bonding & Ins. Co. v. Oliner, 115 A. 592, 593 (Md. 1921) (citation omitted).
16. Michigan: "Insurance is a contract in which one party, for consideration, assumes delineated risks of the other party." King v. Ford Motor Credit Co., 668 N.W.2d 357, 369 (Mich. Ct. App. 2003) (internal citation omitted).
17. Minnesota: "An insurance policy essentially shifts the risk of loss from the insured to the insurer whereby the insurer assumes the risk of loss and undertakes to indemnify the insured against such loss." Goodyear Tire & Rubber Co. v. Dynamic Air, Inc., 702 N.W.2d 237, 244 (Minn. 2005) (citation omitted).
18. Mississippi: "Mississippi recognizes that an insured bargains for more than mere eventual monetary proceeds of a policy; insureds bargain for such intangibles as risk aversion, peace of mind, and certain and prompt payment of the policy proceeds upon submission of a valid claim." Andrew Jackson Life Ins. Co. v. Williams, 566 So.2d 1172, 1179, n.9 (Miss. 1990).
19. Nebraska: "Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified

contingency." Adolf v. Union Nat'l Life Ins. Co., 101 N.W.2d 504, 508-509 (Neb. 1960).

20. New Hampshire: "The common definition of 'insurance' includes both 'the action or process of insuring ... against loss or damage by a contingent event (as death, fire, accident, or sickness' and 'a device for the elimination or reduction of an economic risk common to all members of a large group and employing a system of equitable contributions out of which losses are paid,'" New Hampshire Motor Transp. Ass'n Emp. Benefit Trust v. New Hampshire Ins. Guar. Ass'n, 914 A.2d 812, 815 (N.H. 2006) (internal citation omitted).
21. New Jersey: "The essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer. The essence of self-insurance, a term of colloquial currency rather than of precise legal meaning, is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract." American Nurses Ass'n v. Passaic Gen. Hosp., 471 A.2d 66, 69 (N.J. Super. Ct. App. Div. 1984) (internal citation omitted).
22. New Mexico: "Insurance is a contract whereby for consideration one party agrees to indemnify or guarantee another party against specified risks. . . . In contrast, self-insurance is a process of risk retention whereby an entity 'set[s] aside assets to meet foreseeable future losses.'. . . A self-insurer protects itself from liability; it does not assume the risk of another." Cordova v. Wolfel, 903 P.2d 1390, 1392 (N.M. 1995) (internal citations omitted).
23. New York: "The contract of insurance is an agreement whereby, for a stipulated consideration or premium, the insurance company undertakes to indemnify the other against certain risks in which that party has an interest recognized by law." Home Ins. Co. v. Bernstein, 16 N.Y.S.2d 45, 47 (N.Y. Mun. Ct. 1939).
24. North Carolina: "One characteristic of an insurance contract is the shifting of a risk from the insured to the insurer. If no risk is shifted there is not an insurance contract." Blackwelder v. City of Winston-Salem, 420 S.E.2d 432, 435 (N.C. 1992) (internal citation omitted).
25. Ninth Circuit: "The 'underwriting or spreading of risk' was held to be an 'indispensable characteristic of insurance.'" Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1285 (9th Cir. 1983) (citation omitted).
26. Ohio: "'Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency.'" State ex rel. Duffy v. Western Auto Supply Co., 16 N.E.2d 256, 259 (Ohio 1938) (internal citation omitted).
27. South Dakota: "'The essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer.'" 'Shifting the risk' can be defined as 'the transfer of the impact of a potential loss from the insured to the insurer.'" State Div. of Ins. v. Norwest Corp., 581 N.W.2d 158, 161 (S.D. 1998) (internal citations omitted).
28. Texas: "Broadly defined, insurance is a contract by which one party for a consideration assumes particular risks of the other party and promises to pay him or someone named by him a certain or ascertainable sum of money on a specified contingency." Denton v. Ware, 228 S.W.2d 867, 870 (Tex. App. 1949) (internal citation omitted).

29. Utah: "The Utah Insurance Code defines insurance as "an arrangement, contract, or plan for the transfer of a risk or risks from one or more persons to one or more other persons.*"* Pugh v. North Am. Warr. Servs., Inc., 1 P.3d 570, 574 (Utah Ct. App. 2000) (internal citation omitted).
30. Virginia: "With self-insurance, there is neither an insured nor an insurer. In fact, self-insurance does not involve the transfer of a risk of loss, but rather a retention of that risk, making it the 'antithesis of insurance.'*"* Farmers Ins. Exch. v. Enterprise Leasing Co., 708 S.E.2d 852, 857 (Va. 2011) (internal citation omitted).
31. Washington: "Life insurance involves both risk-shifting and risk-distributing. A contract may be a risk-shifting device, but to be a contract of insurance, which is a risk-distributing device, it must possess both features, and unless it does it is not a contract of insurance whatever be its name or its form." *In re Smiley's Estate*, 216 P.2d 212, 214 (Wash. 1950) (citation omitted).

APPENDIX B: STATES WITH "SAFE HARBOR" STATUTES FOR HCSMS

1. Alabama – ALA. CODE § 22-6A-3 (2012) (effective 2012).
2. Arizona – ARIZ. REV. STAT. ANN. § 20-122 (2012) (effective 2011).
3. Florida – FLA. STAT. ANN. § 624.1265 (West 2012) (effective 2008).
4. Georgia – GA. CODE ANN. § 33-1-20 (West 2012) (effective 2011).
5. Iowa – IOWA CODE ANN. § 505-22 (West 2012) (effective 1995).
6. Illinois – 215 ILL. COMP. STAT. 5/4(b) (West 2012) (effective 2013).
7. Indiana – IND. CODE ANN. § 27-1-2.1-1, 1-2 (West 2012) (effective 2012).
8. Kansas – KAN. STAT. ANN. § 40-202(j) (West 2012).
9. Kentucky – KY. REV. STAT. § 304.1-120 (7) (West 2012).
10. Maryland – MD. CODE. ANN., INS. §1-202 (4) (West 2012).
11. Maine – ME. REV. STAT. ANN. tit. 24-A, § 704 (3) (West 2012).
12. Missouri – MO. REV. STAT. § 376.1750 (West 2012) (effective 2007).
13. New Hampshire – N.H. REV. STAT. ANN. § 126-V:1 (2013) (effective 2012).
14. North Carolina – N.C. GEN. STAT. ANN. § 58-49-12 (West 2012) (effective 2011).
15. Oklahoma – OKLA. STAT. ANN. tit. 36, § 110-11 (West 2012).
16. Pennsylvania – 40 PA. CONS. STAT. ANN. § 23 (West 2012) (effective 1994).
17. South Dakota – S.D. CODIFIED LAWS § 58-1-3.3 (2012) (effective 2012).
18. Utah – UTAH CODE ANN. § 31A-1-103(3)(c) (West 2012).
19. Virginia – VA. CODE. ANN. § 38.2-6300, 6301 (West 2012) (effective 2008).
20. Washington – WASH. REV. CODE ANN. § 48.43.009 (West 2012).
21. Wisconsin – WIS. STAT. ANN. § 600.01 (1)(b)(9) (West 2012).